(6)

No. 94-1785-CFX
Status: GRANTED

Title: Commissioner of Internal Revenue, Petitioner
v.
Robert F. Lundy

Docketed:
April 28, 1995

Court: United States Court of Appeals for
the Fourth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Ross,Lawrence J., Schwartz,Glenn P.

Entry	Date	Note	Proceedings and Orders
1	Apr 28 1995	G	Petition for writ of certiorari filed.
2	May 9 1995		Brief of respondent Robert Lundy in opposition filed.
3	May 10 1995		DISTRIBUTED. May 26, 1995 (Page 1)
4	May 30 1995		Petition GRANTED.
			**********
5	Jun 6 1995	G	Motion of petitioner to dispense with printing the joint appendix filed.
6	Jun 26 1995		Motion of petitioner to dispense with printing the joint appendix GRANTED.
7	Jul 14 1995		Brief of petitioner Commissioner of Internal Revenue filed.
8	Aug 10 1995		Record filed.
		*	Original record proceedings United States Tax Court.
9	Aug 16 1995		Brief of respondent Robert F. Lundy filed.
15	Aug 16 1995		LODGING consisting of 9 copies of a bound volume received from counsel for the respondent.
16	Aug 16 1995		Brief amicus curiae of David M. Kirsch filed.
11	Aug 24 1995		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Fourth Circuit.
12	Sep 5 1995		SET FOR ARGUMENT MONDAY, NOVEMBER 6, 1995. (1ST CASE).
13	Sep 11 1995		CIRCULATED.
14	Sep 20 1995	X	Reply brief of petitioner filed.
17	Nov 6 1995		ARGUED.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

COMMISSIONER OF INTERNAL REVENUE,
PETITIONER

v.

ROBERT F. LUNDY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether 26 U.S.C. 6512(b)(3)(B) bars a taxpayer from obtaining a refund of an overpayment of income taxes in a Tax Court case (i) when he failed to file a return for more than two years after the return was due and (ii) then filed his return only after the Commissioner issued the notice of deficiency that led to the Tax Court litigation.

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COMMISSIONER OF INTERNAL REVENUE,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-29a) is reported at 45 F.3d 856. The opinion of the Tax Court (App., *infra*, 30a-52a) is reported at 65 T.C.M. (CCH) 3011.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 6511, 26 U.S.C., provides, in relevant part:

(a) Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. * * *

* * * * *

(b)(2)(A) If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return. * * *

* * * * *

(b)(2)(B) If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.

* * * * *

2. Section 6512, 26 U.S.C., provides, in relevant part:

(b)(1) Except as provided by paragraph (3) and by section 7463, if the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of income tax for the same taxable year, * * * the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Tax Court has become final, be credited or refunded to the taxpayer.

* * * * *

(b)(3) No such credit or refund shall be allowed or made of any portion of the tax unless the Tax Court determines as part of its decision that such portion was paid—

* * * * *

(B) within the period which would be applicable under section 6511(b)(2), (c), or (d), if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating the grounds upon which the Tax Court finds that there is an overpayment * * *.

STATEMENT

1. Although federal income taxes were withheld from respondent's wages during 1987, he failed to file an income tax return for that year when it was due, on April 15, 1988. More than two years later, on September 26, 1990, in the absence of any return from respondent, the Commissioner of Internal Revenue

mailed respondent a notice of deficiency of $13,806 in his income taxes for 1987. Three months later, on December 22, 1990, respondent filed a joint income tax return for 1987 with his wife. That untimely return asserted a $3,537 overpayment of their joint income tax liability for 1987 (App., *infra*, 2a).

2. a. On December 28, 1990, respondent sought a redetermination in the Tax Court of the deficiency asserted by the Commissioner in his 1987 income taxes. Respondent also sought a further determination that he had overpaid his 1987 taxes by $3,537. Upon review of the information contained in respondent's untimely return, the Commissioner filed an amended answer that acknowledged that a deficiency did not exist in respondent's 1987 taxes and that respondent had, in fact, made an overpayment of $3,537 in the taxes that he owed for that year (App., *infra*, 2a).

Following these stipulations, the only issue remaining in the Tax Court was whether respondent was entitled to a refund of the overpayment. The Commissioner contended that a refund of the overpayment was barred by the provisions of Sections 6511 and 6512 of the Internal Revenue Code, 26 U.S.C. 6511, 6512 (App., *infra*, 3a).

b. The Tax Court agreed with the Commissioner that Sections 6511 and 6512 bar any recovery upon respondent's refund claim (App., *infra*, 30a-52a). The court noted that Section 6512(b)(3)(B) limits the amount of any overpayment that may be refunded in a Tax Court case to the amount that would have been refundable under Section 6511(b)(2) if a claim for refund had been filed by the taxpayer "on the date of the mailing of the notice of deficiency" (App., *infra*, 37a, quoting 26 U.S.C. 6512(b)(3)(B)). The court

stated that Section 6512(b)(3)(B) "directs us to focus on the situation as it would have been on a specified date—the date of the mailing of the notice of deficiency. Thus, this provision requires us to 'take a snapshot' of the situation" as of the date of the mailing of the notice of deficiency (App., *infra*, 38a). Because, as of the date the notice of deficiency was mailed, respondent had not filed a return for his 1987 taxes, the amount of the overpayment of tax that was refundable to him was the amount of tax he had paid within the two-year period immediately preceding the date that the notice of deficiency was mailed (*id.* at 39a, citing 26 U.S.C. 6511(b)(2)(B)). Since respondent had not paid any of the taxes involved in this case during the two-year period preceding the notice of deficiency, the court concluded that Section 6512(b)(3)(B) bars any refund of respondent's overpayment (App., *infra*, 39a).

3. The court of appeals reversed (App., *infra*, 1a-29a). In doing so, the court rejected the decisions of several other circuits that had upheld the Tax Court's analysis of these statutory provisions (*id.* at 21a-22a, citing, *e.g.*, *Richards* v. *Commissioner*, 37 F.3d 587 (10th Cir. 1994), petition for cert. pending, No. 94-1537).[1] The court of appeals held in the present case (App., *infra*, 12a) that, notwithstanding the plain language of the statute, Section 6512(b)(3)(B) does not require the Tax Court to test the taxpayer's claim for refund as if it were filed on the date that the notice of

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[1] See also *Davison* v. *Commissioner*, 9 F.3d 1538 (2d Cir. 1993) (Table) (unpub.), aff'g 64 T.C.M. (CCH) 1517 (1992); *Allen* v. *Commissioner*, 23 F.3d 406 (6th Cir. 1994) (Table) (unpub.), aff'g 99 T.C. 475 (1992); *Galuska* v. *Commissioner*, 5 F.3d 195 (7th Cir. 1993).

deficiency was issued.[2] In reaching that conclusion, the court of appeals relied on what it perceived to be evidence in "the legislative history of § 6512 [that] indicates that Congress intended a taxpayer who filed a claim for refund within three years of filing a tax return to have a three-year refund period that runs from the date of the mailing of the notice of deficiency" (App., *infra*, 17a). Based on this reading of the legislative history, the court stated (*ibid.*):

> We interpret § 6512(b)(3)(B) to provide for a three-year refund period where the taxpayer files a claim for refund in Tax Court within three years of filing his tax return and to commence the refund period from the date of the mailing of the notice of deficiency.

The court of appeals also relied on what it perceived to be the potential anomaly that respondent "would have received his refund if he had filed his claim for refund in a United States district court or the United States Claims Court" (App., *infra*, 10a). In making this assertion, the court assumed that a return filed by a taxpayer more than two years after the return is due would permit a subsequent refund claim to invoke the three-year refund period of Section 6511(b)(2)(A). The court recognized (App., *infra*, 27a) that its

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[2] The Court of appeals also expressly disagreed (App., *infra*, 22a, 25a-28a) with the Ninth Circuit's analysis of Section 6511 in *Miller* v. *United States*, 38 F.3d 473 (1994). The analysis of the Ninth Circuit in *Miller* led directly to that court's decision in *Rossman* v. *Commissioner*, 46 F.3d 1144 (1995) (Table), which held that Section 6512(b)(3)(B) barred a refund of the overpayment made by the taxpayer in that case. The decision in *Rossman* directly conflicts with the decision of the court of appeals in the present case.

assumption that the same taxpayer would fare differently in a refund suit in the Court of Federal Claims or in federal district court than in the Tax Court had been squarely rejected by the Ninth Circuit in *Miller* v. *United States*, 38 F.3d 473, 475-476 (1994). In *Miller*, the court ruled that, when a return is not filed within "two years after payment," the taxpayer's claim—whether brought in the Court of Federal Claims, federal district court *or* in the Tax Court—is barred by Section 6511(a). 38 F.3d at 476. The court explained in *Miller* that an untimely return filed more than two years after the date of payment "cannot resurrect the three-year period" (*id.* at 475):

> If the clock were to run only from the filing of the return, no claim would ever be barred as long as the return was not filed. * * * The point at which one must determine whether a return has or has not been filed, for purposes of [Section 6511(a)], must be two years after payment. Otherwise, no claim could ever finally be barred by the two-year-after-payment clause because the taxpayer could at any time file a return and have three more years to assert the claim.

In the present case, however, the court of appeals expressly disagreed with the reasoning of *Miller*. The court concluded instead that, "under § 6511(a), [a taxpayer] has three years from the date of the filing of even a delinquent tax return to file a claim for refund" (App., *infra*, 27a). The court did not attempt to explain what, if any, role it would attribute to the two-year limit on refunds under Section 6511(a) that was central to the court's decision in *Miller*.

The court of appeals summarized its holding in the present case as follows (App., *infra*, 12a):

> We hold that the Tax Court, when applying the limitation provision of § 6511(b)(2) in light of § 6512(b)(3)(B), should substitute the date of the mailing of the notice of deficiency for the date on which the taxpayer filed the claim for refund, but only for the purpose of determining the benchmark date for measuring the limitation period and not for the purpose of determining whether the two-year or three-year limitation period applies. In other words, we interpret § 6512(b)(3)(B) as merely shifting back the benchmark date of the refund period from the date on which the taxpayer filed the claim for refund to the date on which the IRS mailed the notice of deficiency; § 6512(b)(3)(B) does not change the length of the refund period from what would have been applied under § 6511(b)(2).

Because the entire amount of the overpayment involved in this case had been made within three years of the date of the notice of deficiency and within three years of respondent's belated income tax return, the court concluded that respondent was entitled to a refund of the overpayment under Section 6512(b)(3)(B) (App., *infra*, 13a).

REASONS FOR GRANTING THE PETITION

As the court of appeals acknowledged (App., *infra*, 21a), the decision in this case directly conflicts with the decision of the Tenth Circuit in *Richards* v. *Commissioner*, 37 F.3d 587 (1994), petition for cert. pending, No. 94-1537. It also conflicts with the decision of the Seventh Circuit in *Galuska* v.

Commissioner, 5 F.3d 195 (1993), and with the unreported decisions of the Second, Sixth and Ninth Circuits in *Davison* v. *Commissioner*, 9 F.3d 1538 (1993) (Table), *Allen* v. *Commissioner*, 23 F.3d 406 (1994) (Table), and *Rossman* v. *Commissioner*, 46 F.3d 1144 (1995) (Table).

For the reasons set forth in the Commissioner's brief acquiescing in the petition for a writ of certiorari filed in *Richards* v. *Commissioner*, No. 94-1537, the question presented in this case is a recurring one of substantial importance on which the courts of appeals are in express disagreement.[3] Because this case presents the same question presented in *Richards*, and involves facts that are indistinguishable from the facts of *Richards*, the petition in this case should be held and disposed of as appropriate in light of this Court's disposition of *Richards*.

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[3] We are supplying counsel for respondent in this case with a copy of our brief in *Richards*.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of this Court's disposition of *Richards* v. *Commissioner*, No. 94-1537.

Respectfully submitted.

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APRIL 1995

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 94-1260

ROBERT F. LUNDY, PETITIONER-APPELLANT

v.

INTERNAL REVENUE SERVICE,
RESPONDENT-APPELLEE

Appeal from the United States Tax Court
(Tax Ct. No. 90-29009)

Argued Dec. 7, 1994
Decided Jan. 30, 1995

Before: RUSSELL and MICHAEL, Circuit Judges, and MESSITTE, United States District Judge for the District of Maryland, sitting by designation.

OPINION

RUSSELL, Circuit Judge:

Robert F. Lundy appeals the judgment of the United States Tax Court denying his claim for a refund of income taxes withheld in 1987. This case requires this Court to interpret sections 6511 and 6512 of the Internal Revenue Code (the "Code") to determine whether Lundy's refund claim was timely.

I.

Lundy was employed in 1987 and had federal income tax withheld from his wages. He did not file a tax return by April 15, 1988, the due date for 1987 tax returns. On September 26, 1990, over two years after Lundy's tax return was due, the Commissioner of Internal Revenue mailed Lundy a notice of deficiency, notifying him that there was a deficiency in the amount of $13,806 in his income tax for 1987.

On December 22, 1990, Lundy mailed his 1987 tax return (filed jointly with his wife), which was received by the Internal Revenue Service (the "IRS") on December 28, 1990. The return showed an overpayment of income tax in the amount of $3,537. On December 28, 1990, Lundy filed a petition in the Tax Court requesting it to determine that there was an overpayment of tax and that he was entitled to a refund.

The Commissioner filed her answer on February 19, 1991. She generally denied the allegations in Lundy's petition but did not at that time claim that Lundy's petition was time-barred. In the Tax Court, the parties stipulated that Lundy's tax liability for 1987 was $778 greater than the amount stated on the tax return. Joint Appendix ("J.A.") 13. The parties also stipulated that there was an addition to tax of $369 under 26 U.S.C. § 6653(a)(1)(A). J.A. 14. The parties also stipulated that the Commissioner, in a conference call with the Tax Court, "indicated that it was her understanding that a settlement had been reached which involved a refund." J.A. 56. On February 3, 1992, the IRS sent a notice to Lundy which stated the following:

> Amount to be refunded to you if you owe no other obligations $3,537.00
>
> You may have already received this check. If not, please allow 2 weeks for it to be mailed to you, unless there are other matters pending which could postpone your refund.

On March 17, 1992, more than a year after the Commissioner filed her answer, the Commissioner filed a motion to amend her answer and raised the defense that Lundy's claim for refund was time-barred by the limitation periods of 26 U.S.C. §§ 6511 and 6512. The Tax Court granted the motion.

On June 28, 1993, the Tax Court held that it could not grant a refund for the overpayment of income tax. The Tax Court held that, under 26 U.S.C. § 6512(b)(3)(B), Lundy is entitled to a refund only for taxes paid within two years prior to the date that the Commissioner sent the notice of deficiency. Lundy's tax payments, consisting of amounts withheld from his and his wife's wages, are deemed to have been paid on April 15, 1988. 26 U.S.C. § 6513(b)(1). Because the Commissioner sent the notice of deficiency on September 26, 1990, more than two years after the date Lundy is deemed to have paid his taxes (April 15, 1988), the Tax Court could not order a refund for the overpayment of taxes. Both parties agree that if Lundy had filed a claim for refund in a United States district court or in the United States Claims Court, he would have received his refund.

II.

The limitation provisions in 26 U.S.C. § 6511 apply to claims for refund filed in a United States district court or in the United States Court of Claims. The limitation provisions in 26 U.S.C. § 6512 apply to petitions filed in the United States Tax Court. Because Lundy filed a petition in the Tax Court, the limitation provisions in § 6512 apply to this case. For background, however, we first provide an overview of § 6511.

Section 6511 imposes limitations on both the period for filing a claim for refund (the "filing period"), 26

U.S.C. § 6511(a), and the period for calculating the amount of refund (the "refund period"), 26 U.S.C. § 6511(b). Regarding the filing period, § 6511(a) requires that the taxpayer file a claim for refund within three years of filing a tax return or within two years of paying the tax. 26 U.S.C. § 6511(a).[1]

The refund period in § 6511(b) restricts the taxpayer's ability to recover overpaid taxes to either the two-year or three-year period immediately preceding the filing of the refund claim. Which refund period applies depends upon how the taxpayer satisfied the requirements of § 6511(a). If the taxpayer satisfied § 6511(a) by filing the claim for refund within three years of filing a tax return, the three-year refund period applies, which means that the taxpayer can recover overpaid taxes that were paid within the three years preceding the filing of the claim. 26 U.S.C. § 6511(b)(2)(A). If the taxpayer has satisfied § 6511(a) by filing the claim for refund within two years of paying the tax, the two-year refund period applies, which means that the taxpayer can recover overpaid taxes that were paid only within two years preceding the filing of the claim. 26 U.S.C. § 6511(b)(2)(B).[2]

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[1] Section 6511(a) reads, in relevant part, as follows:

(a) Period of Limitation on Filing Claim

Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid.

26 U.S.C. § 6511(a).

[2] Section 6511(b)(2) reads, in relevant part, as follows:

(b) Limitation on allowance of credits and refunds

Section 6511 gives a taxpayer three years from the due date of his income tax return to claim a refund for all income tax withheld from him during the tax year. The due date for 1987 income tax returns, for instance, was April 15, 1988. If a taxpayer filed a claim for refund of 1987 taxes in a United States district court or the United States Claims Court between April 15, 1988 and April 15, 1991, the taxpayer would satisfy the requirement of § 6511. He could easily meet the limitation requirement of § 6511(a) simply by filing a tax return before filing the claim for refund.[3] Furthermore, the three-year limitation period would apply under § 6511(b)(2)(A); since taxes withheld during the 1987 tax year are deemed to have been paid on April 15, 1988, 26 U.S.C. § 6513(b)(1),[4] the

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* * *

(2) Limit on amount of credit or refund

(A) Limit where claim filed within 3-year period

If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return. . . .

(B) Limit where claim not filed within 3-year period

If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.

26 U.S.C. § 6511(b)(2).

[3] This is a matter of course, because a taxpayer files a claim for refund by filing an income tax return.

[4] Section 6513(b)(1) reads, in relevant part, as follows:

(b) Prepaid income tax

taxpayer could collect a refund of any overpayment of withheld taxes as long as the taxpayer filed his claim on or before April 15, 1991. On the other hand, if the taxpayer filed his claim for refund after April 15, 1991, the claim would be barred under § 6511(b) because the payment of taxes occurred more than three years from the date of the filing of the claim. Nonetheless, when a taxpayer fails to file a tax return by the due date, he has a three-year window of opportunity to file a tax return and claim his refund.

The two-year refund period allows certain taxpayers, in very specific circumstances, to file a legitimate claim for refund beyond the three-year window of opportunity. Although a taxpayer normally pays income tax during the tax year and is deemed to have paid the tax on April 15 of the following year, a taxpayer may have a reason to pay additional tax after this time. In such a case, the taxpayer can file a claim for refund more than three years from the due date of tax returns, as long as the claim is filed within two years of paying the additional tax. Furthermore, the amount of refund is limited to the amount of the additional tax paid within two years of filing the claim. The two-year period, however, does not cut short the three-year window of opportunity that taxpayers have to collect refunds on their withheld tax; it only extends the three-year window in cases where the taxpayer paid additional tax after the due date of tax returns.

For purposes of section 6511 or 6512—

(1) Any tax actually deducted and withheld at the source during any calendar year ... shall ... be deemed to have been paid by him on the 15th day of the fourth monthfollowing the close of his taxable year. . . .

26 U.S.C. § 6513(b)(1).

III.

The limitation provisions in 26 U.S.C. § 6512 apply to Lundy's case because he filed a petition in the United States Tax Court. A taxpayer can invoke the jurisdiction of the Tax Court only if the IRS sends a notice of deficiency. A taxpayer can challenge the notice of deficiency in the Tax Court by filing a petition for redetermination. The petition may include a claim for a refund of an overpayment. If, in its redetermination of a taxpayer's liability, the Tax Court finds that the taxpayer has made an overpayment of tax, § 6512(b)(1) gives the Tax Court jurisdiction to determine the amount of such overpayment and to include the refund in its final order. Because a taxpayer files a petition for redetermination in the Tax Court only in response to a notice of deficiency, there is no equivalent in § 6512 to the filing period of § 6511(a).

On the other hand, the Tax Court is also limited by a refund period. Section 6512(b)(3) limits the period for which the Tax Court can calculate the amount of refund. That section reads, in relevant part, as follows:

(3) Limit on amount of credit or refund

No such credit or refund shall be allowed or made of any portion of the tax unless the Tax Court determines as part of its decision that such portion was paid—

* * *

(B) within the period which would be applicable under section 6511(b)(2), (c), or (d), if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating

> the grounds upon which the Tax Court finds that there is an overpayment. . . .[5]

26 U.S.C. § 6512(b)(3)(B). Section 6512(b)(3)(B) cross-references to § 6511(b)(2) to determine the refund period.[6] The crux of this case is whether the Tax Court, when determining the refund period under § 6512(b)(3)(B), should have applied the three-year limitation period under § 6511(b)(2)(A) or the two-year limitation period under § 6511(b)(2)(B).

A.

The Tax Court accepted the Commissioner's argument that, under § 6512(b)(3)(B), a taxpayer is deemed to have filed a claim for refund on the date the notice of deficiency was mailed to him. When the Tax Court determined the appropriate refund period under § 6511(b)(2), it deemed that Lundy had filed his claim for refund on September 26, 1990, the date the Commissioner mailed the notice of deficiency to Lundy, even though Lundy actually filed his claim for refund with his petition for redetermination on December 28, 1990.

The Tax Court applied the two-year limitation period under § 6511(b)(2)(B) instead of the three-year limitation period under § 6511(b)(2)(A). The Tax Court did not apply the three-year limitation period because Lundy did not file his claim for refund within three years of filing his tax return. Because the Tax Court deemed that Lundy filed his claim on September 26, 1990, the date of the mailing of the notice of deficiency, the Tax Court concluded that Lundy filed a claim for refund before he filed a tax return, which Lundy did not file until December 28,

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[5] The parties agree that § 6512(b)(3)(A) and (C) do not apply to this case.

[6] The parties agree that § 6511(c) and (d) do not apply to this case.

1990. Thus, the Tax Court applied the two-year limitation period.

Because Lundy was deemed to have paid his taxes on April 15, 1988, more than two years before the date the Tax Court deemed that he filed his claim for refund (September 26, 1990), the Tax Court concluded that it had no authority to grant Lundy a refund.

B.

One problem with the Tax Court's reading of § 6512(b)(3)(B) is that the language of that section does not include the word "deemed." The word "deemed" is used in many sections throughout the Code, but not in § 6512. For example, § 6513(b) provides that income tax withheld during a tax year shall be "deemed" to have been paid on April 15 of the following year, 26 U.S.C. 6513(b)(1), and that any amount paid as estimated income tax shall be "deemed" to have been paid on the due date for filing tax returns, 26 U.S.C. § 6513(b)(2). The Code also provides that "any return filed before the last day prescribed for the filing thereof shall be *considered* as filed on such last day. For purposes of section 6511(b)(2) and (c) and section 6512, payment of any portion of the tax made before the last day prescribed for the payment of the tax shall be *considered* made on such last day." 26 U.S.C. § 6513(a) (emphasis added).

In sharp contrast, § 6512(b)(3)(B) does not use the word "deemed" or "considered." Instead, the provision directs the Tax Court to apply the refund period that would apply under § 6511(b)(2) in the hypothetical situation that the taxpayer had filed a claim for refund on the date of the mailing of the notice of deficiency. If Congress had intended that a claim for refund filed in the Tax Court shall be deemed to have been filed on the date of the mailing of

the notice of deficiency, Congress could have said so explicitly.

C.

Furthermore, the Tax Court's interpretation of § 6512(b)(3)(B) has pernicious effects. The result of the Tax Court's holding is that Lundy cannot receive a refund even though he overpaid his taxes and filed a tax return and claim for refund within three years of the due date for filing tax returns. Lundy, however, would have received his refund if the circumstances had been only slightly different.

Lundy would have received his refund if he had filed his claim for refund in a United States district court or the United States Claims Court. Because § 6512 does not apply in a district court or in the Claims Court, only the Tax Court can deem that Lundy filed his claim for refund on the date of the notice of deficiency. Thus, if Lundy had filed a claim for refund in a district court or in the Claims Court on December 28, 1990, the court would have applied the three-year limitation period under § 6511(b)(2)(A) because on that day he filed his tax return. The date that Lundy filed his claim for refund was deemed to be September 26, 1990 only because he filed his claim for refund in Tax Court, and thus, § 6512(b)(3)(B) applied.[7]

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[7] We note, incidentally, that choosing to file a claim for refund in a district court or in the Claims Court would have been a difficult option for an average taxpayer like Lundy. Once the IRS sent Lundy a notice of deficiency, Lundy could file a claim for refund in one of these courts only if he first paid the amount of deficiency that the IRS claimed that he owed. Thus, Lundy would have had to pay $13,806 before he could challenge the notice of deficiency and claim his refund in a district court or in the Claims Court. Even if Lundy had been aware of his option to avail himself of these courts, the requirement to pay the deficiency in advance, given his

Furthermore, Lundy would have received his refund if Lundy had filed his tax return sometime before the Commissioner sent Lundy a notice of deficiency on September 26, 1990. In this situation, if Lundy had filed his claim for refund in the Tax Court on December 28, 1990, the Tax Court still would have deemed September 26, 1990 as the date on which Lundy filed his claim for refund. However, the three-year limitation would have applied under § 6511(b)(2)(A) because the "deemed" date of filing the claim for refund would have been within three years of Lundy's filing of his tax return. Because Lundy paid his taxes on April 15, 1988, within three years of filing his claim for refund (September 26, 1990), the Tax Court would have had the authority to grant Lundy a refund.

Still further, Lundy would have received his refund if the Commissioner of Internal Revenue had happened to send the notice of deficiency before April 15, 1990. The Tax Court still would have applied the two-year limitation period from the date of the notice of deficiency, but the two-year period would have been sufficient to include April 15, 1988, the date on which Lundy paid his taxes.

Lundy did not receive his refund only because (1) he filed his claim for refund in Tax Court instead of a district court or Claims Court, (2) he filed his tax return after the Commissioner sent a notice of deficiency, and (3) the Commissioner sent the notice of deficiency more than two years after the date on which Lundy paid his taxes. If any one of these circumstances had been different, Lundy would have received his refund.

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income, would most likely have prohibited him from filing his claim for refund there. The advantage of and reason for the Tax Court is that the average taxpayer can challenge a notice of deficiency without first having to pay the deficient amount.

IV.

We reject the Tax Court's interpretation of § 6512(b)(3)(B) and hold that the three-year limitation period should have applied to Lundy.

Section 6512(b)(3)(B) requires the Tax Court to apply the limitation provision in § 6511(b)(2) that would be applicable if, on the date the IRS mailed the notice of deficiency, the taxpayer had filed a claim for refund, regardless of whether the taxpayer actually had filed a claim for refund on that day. In § 6511(b)(2), however, the date of the filing of the claim for refund is critical for two reasons. First, the date on which the taxpayer filed the claim for refund, if it is within three years after the filing of the tax return, establishes that a three-year limitation period applies instead of a two-year limitation period. Second, the date on which the taxpayer filed the claim for refund is the benchmark date for measuring the limitation period (whether two-year or three-year).

We hold that the Tax Court, when applying the limitation provision of § 6511(b)(2) in light of § 6512(b)(3)(B), should substitute the date of the mailing of the notice of deficiency for the date on which the taxpayer filed the claim for refund, but only for the purpose of determining the benchmark date for measuring the limitation period and not for the purpose of determining whether the two-year or three-year limitation period applies. In other words, we interpret § 6512(b)(3)(B) as merely shifting back the benchmark date of the refund period from the date on which the taxpayer filed the claim for refund to the date on which the IRS mailed the notice of deficiency; § 6512(b)(3)(B) does not change the length of the refund period from what would have been applied under § 6511(b)(2).[8]

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[8] We note that the Internal Revenue Code does not allow a taxpayer to delay indefinitely his response to a notice of deficiency. Section 6213(a) of the Code requires a taxpayer who wants to challenge a notice of deficiency to file a petition for redetermination within 90 days of the mailing of the notice of deficiency. 26 U.S.C. § 6213(a). For more on this point, see our discussion of *Galuska v. Commissioner*, 5 F.3d 195 (7th Cir.1993), *infra* at section V.

Thus, the Tax Court should have applied the three-year limitation period in Lundy's case and should have begun the three-year period from the date on which the IRS mailed Lundy the notice of deficiency. Under § 6511(b)(2), the three-year limitation period applies because Lundy filed his claim for refund on December 28, 1990, within three years of filing his tax return, which he did also on December 28, 1990. Because Lundy filed his claim for refund in the Tax Court, § 6512(b)(3)(B) allows the Tax Court to count back three years from the date of the mailing of the notice of deficiency, instead of the date on which Lundy filed his claim. Because Lundy paid his taxes on April 15, 1988, within three years of the date of the mailing of the notice of deficiency (September 26, 1990), the Tax Court had the authority to determine the amount of Lundy's overpayment and to order a refund.

In our view, § 6512(b)(3)(B) never mandates a two-year refund period in the Tax Court where a United States district court or the United States Claims Court would have applied the three-year period under § 6511(b)(2). Instead, Congress intended in § 6512(b)(3)(B) to provide some relief for taxpayers who receive a notice of deficiency, by allowing the three-year period to run from the date of the notice of the deficiency instead of the date on which the taxpayer actually files the claim for refund. Thus, a taxpayer who receives a notice of deficiency can still recover his overpayment of taxes even though he did not actually file the claim for refund within three

years of the due date for tax returns. In other words, § 6512(b)(3)(B) extends the three-year window of opportunity to claim a refund for taxpayers who receive a notice of deficiency from the IRS.

The legislative history of § 6512 supports our interpretation of § 6512(b)(3)(B). Section 6512(b)(3) of the Code was derived from § 322(d) of the Internal Revenue Code of 1939, ch. 2, 53 Stat. 1, 92 (1939). Section 322(d) read, in pertinent part, as follows:

> No such credit or refund shall be made of any portion of the tax unless the Board [of Tax Appeals] determines as part of its decision that such portion was paid (1) within three years before the filing of the claim or the filing of the petition, whichever is earlier, or (2) after the mailing of the notice of deficiency.

53 Stat. at 91. Originally, then, the Board of Tax Appeals, the predecessor to the Tax Court, clearly applied a three-year refund period; unlike the current statute, however, the three-year period ran from the date on which the taxpayer filed his claim for refund or his petition for redetermination, and not from the date of the mailing of the notice of deficiency.[9]

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[9] In the 1939 Code, § 322(b)(1), the predecessor of § 6511(a), provided the same general rule as the current provision. It read as follows:

> (b) Limitation on Allowance.—
>
> (1) Period of limitation.—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expired the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

Internal Revenue Code of 1939, ch. 2, § 322(b)(1), 53 Stat. 1, 91 (1939).

Section 322(b)(2), the predecessor of § 6511(b), contained only a three-year refund period. Like § 322(d), there was no mention of a two-year refund period. The language of § 322(b)(2) read as follows:

> (2) Limit on amount of credit or refund.—The amount of the credit or refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or, if no claim was filed, then during the three years immediately preceding the allowance of the credit or refund.

Internal Revenue Code of 1939, ch. 2, § 322(b)(2), 53 Stat. 1, 92 (1939).

The two-year limitation period did not enter the Code until the 1942 amendments. Congress amended § 322(d) to read, in relevant part, as follows:

> No such credit or refund shall be made of any portion of the tax unless the Board [of Tax Appeals] determines as part of its decision (1) that such portion was paid (A) within two years before the filing of the claim, the mailing of the notice of deficiency, or the execution of an agreement by both the Commissioner and the taxpayer ... whichever is earliest, or (B) within three years before the filing of the claim, the mailing of the notice of deficiency, or the execution of the agreement, whichever is earliest, if the claim was filed, the notice of deficiency mailed, or the agreement executed within three years from the time the return was filed by the taxpayer....

Revenue Act of 1942, ch. 619, § 169(b), 56 Stat. 798, 877-78 (1942). Under this provision, Lundy would

clearly have received a refund. The three-year refund period would have applied because Lundy filed a claim for refund within three years of filing a tax return. The three-year refund period would have run from the date of the mailing of the notice of deficiency because it was earlier than the date of the filing of the claim for refund. The language does not indicate that, because the mailing of the notice of deficiency occurred before the filing of the tax return, the two-year refund period should apply.[10]

In the Internal Revenue Code of 1954, § 6512 replaced § 322(d) of the 1942 Code. Although the language of § 6512 differed from the language in the 1942 Code, the legislative history makes clear that Congress intended to make no material change to this

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[10] The 1942 amendments also changed § 322(b)(2) to include the two-year refund period in courts other than the Board of Tax Appeals. The new language of § 322(b)(2) read as follows:

> (2) Limit on Amount of Credit or Refund.—The amount of the credit or refund shall not exceed the portion of the tax paid—
>
> (A) If a return was filed by the taxpayer, and the claim was filed within three years from the time the return was filed, during the three years immediately preceding the filing of the claim.
>
> (B) If a claim was filed, and (i) no return was filed, or (ii) if the claim was not filed within three years from the time the return was filed by the taxpayer, during the two years immediately preceding the filing of the claim. . . .

Revenue Act of 1942, ch. 619, § 169(a), 56 Stat. 798, 876 (1942). In the 1942 Code, then, a taxpayer who filed a claim for refund within three years of filing a tax return received a three-year refund period regardless of the forum in which he chose to file. The only difference in the Board of Tax Appeals was that the three-year refund period began running from the date of the mailing of the notice of deficiency, if it was earlier than the date of filing the claim for refund.

section. See H.R.Rep. No. 1337, 83d Cong., 2d Sess. A415 (1954) ("This section [§ 6512] makes no material changes from existing law."), *reprinted* in 1954 U.S.C.C.A.N. 4017, 4563; S. Rep. No. 1622, 83d Cong., 2d Sess. 586 (1954) ("This section [§ 6512] of the House bill, which contains no material change from existing law, was adopted by your committee with two clarifying changes."), reprinted in 1954 U.S.C.C.A.N. 4621, 5236. The amendments to § 6512 since 1954 have made no significant changes to the section.

Thus, the legislative history of § 6512 indicates that Congress intended a taxpayer who filed a claim for refund within three years of filing a tax return to have a three-year refund period that runs from the date of the mailing of the notice of deficiency. There is no indication that Congress ever intended the two-year period to apply to taxpayers who filed a tax return and claim for refund in Tax Court after receiving a notice of deficiency that was mailed to the taxpayer more than two years after the due date of tax returns. We interpret § 6512(b)(3)(B) to provide for a three-year refund period where the taxpayer files a claim for refund in Tax Court within three years of filing his tax return and to commence the refund period from the date of the mailing of the notice of deficiency.

Our interpretation of § 6512(b)(3)(B), besides being consistent with congressional intent, eliminates the inequities resulting from the Tax Court's reading. First, a taxpayer will receive the same limitation period in the Tax Court that he would receive in a United States district court or in the United States Claims Court. There is no rational reason why a taxpayer should have a three-year limitation period shortened to a two-year period simply because he chose the Tax Court as the forum for his claim for refund; if there is such a rational reason, Congress certainly has not articulated it.

On the other hand, it does make sense to allow the limitation period, whether two-year or three-year, to run from the date of the mailing of the notice of deficiency instead of the date of the filing of the claim for refund. Once the IRS mails the taxpayer a notice of deficiency, the taxpayer has to respond in order to avoid paying the deficiency claimed by the IRS. Because the IRS puts the taxpayer to the task of organizing his financial records and filing a tax return, the taxpayer should then be able to collect any refund due to him if the taxpayer could have filed a return and claimed a refund on the date the IRS mailed the notice of deficiency. Otherwise, the IRS could mail the notice of deficiency one day before the three-year window of opportunity for filing claims for refunds expires. In such a case, the taxpayer would have to respond to the notice of deficiency but would probably not be able to organize his financial records and file a claim for refund before the three-year period expires; in fact, the taxpayer probably would not even receive the notice of deficiency before the three-year period for claiming refunds expired. Because the Tax Court is the forum in which taxpayers challenge notices of deficiency, it makes sense that the Tax Court should apply the refund period from the date of the mailing of the notice of deficiency instead of the date of the filing of the claim for refund.

Our interpretation of § 6512(b)(3)(B) also eliminates a second inequity: a taxpayer who files his tax return after receiving a notice of deficiency will receive the same three-year limitation period that he would receive if he had filed his tax return before the IRS mailed the notice of deficiency. There is no rational reason why the taxpayer should have a three-year refund period cut short to two years simply because the IRS beat the taxpayer to the punch by mailing the notice of deficiency first. Congress certainly did not

intend the length of the refund period to turn on such an arbitrary distinction.

Finally, our interpretation of § 6512(b)(3)(B) eliminates a third inequity: a taxpayer has the same opportunity to collect a refund in Tax Court regardless of whether the IRS happened to send the notice of deficiency within two years of the due date for filing tax returns or more than two years from the due date for filing tax returns. There is no logical reason why a taxpayer should be allowed to receive a refund in Tax Court simply because the IRS fortuitously mailed the notice of deficiency within two years of the due date for filing tax returns. While it might be fair to deny a taxpayer his refund because he failed to act quickly enough, it is completely unfair to deny a taxpayer his refund simply because the IRS failed to act quickly enough. Congress certainly did not intend for the taxpayer's ability to collect a refund in Tax Court to turn on when the IRS mailed its notice of deficiency.

The Commissioner's interpretation of § 6512(b)(3)(B) of the Code, which the Tax Court has accepted below and in numerous other decisions, goes against the clear intent of Congress and against common sense. It creates a loophole for the IRS, allowing it to deny refunds to taxpayers who have overpaid their taxes and who have filed tax returns and claims for refund within three years of the due date for filing tax returns. We reverse the decision of the Tax Court and hold that the Tax Court had the authority to determine the amount of Lundy's refund for overpaid taxes.

V.

The Tax Court's interpretation of § 6512(b)(3)(B) in this case follows a recent trend in the Tax Court, beginning with *Allen v. Commissioner*, 99 T.C. 475 (1992), *aff'd*, 23 F.3d 406 (6th Cir.1994) (table), and

succeeded by at least nine other decisions of the Tax Court. See *Braman v. Commissioner*, T.C.M. (P-H) 92,636 (1992); *Davison v. Commissioner*, T.C.M. (P-H) 92,709 (1992), *aff'd*, 9 F.3d 1538 (2d Cir.1993) (table); *Durham v. Commissioner*, T.C.M. (P-H) 93,021 (1993); *Ermatinger v. Commissioner*, T.C.M. (P-H) 93,075 (1993); *Richards v. Commissioner*, T.C.M. (P-H) 93,102 (1993), *aff'd*, 37 F.3d 587 (10th Cir.1994); *Sumiel v. Commissioner*, T.C.M. (P-H) 93,104 (1993); *DiPlacido v. Commissioner*, T.C.M. (P-H) 93,169 (1993); *Patronik-Holder v. Commissioner*, 100 T.C. 374 (1993); *Olmstead v. Commissioner*, T.C.M. (P-H) 93,216 (1993). Furthermore, since the Tax Court decided Lundy's case, it has applied the same interpretation of § 6512(b)(3)(B) in at least nine other decisions. See *Phillips v. Commissioner*, T.C.M. (P-H) 93,284 (1993); *Rossman v. Commissioner*, T.C.M. (P-H) 93,351 (1993); *Raczkiewicz v. Commissioner*, T.C.M. (P-H) 93,617 (1993); *Rosencranz v. Commissioner*, T.C.M. (P-H) 94,075 (1994); *Dyball v. Commissioner*, T.C.M. (P-H) 94,076 (1994); *Kicza v. Commissioner*, T.C.M. (P-H) 94,115 (1994); *Floyd v. Commissioner*, T.C.M. (P-H) 94,379 (1994); *Glazier v. Commissioner*, T.C.M. (P-H) 94,415 (1994); *Khinda v. Commissioner*, T.C.M. (P-H) 94,617 (1994).[11]

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[11] Although the Tax Court applied the two-year limitation period under § 6512(b)(3)(B) in cases before Allen, we note that in those cases the taxpayer either did not file a tax return after receiving the notice of deficiency, *see, e.g., Liles v. Commissioner*, T.C.M. (P-H) 89,613 (1989); *Carey v. Commissioner*, T.C.M. (P-H) 87,452 (1987); *Nason v. Commissioner*, T.C.M. (P-H) 84,534 (1984); *Straw v. Commissioner*, T.C.M. (P-H) 83,641 (1983); *White v. Commissioner*, 72 T.C. 1126 (1979), or filed the tax return after petitioning the Tax Court, *see, e.g., Berry v. Commissioner*, 97 T.C. 339 (1991) (because notice of deficiency mailed more than five years after due date for filing tax returns, taxpayer could not collect refund even under three-year limitation period); *Morin v. Commissioner*, T.C.M. (P-H) 90,404 (1990) (taxpayer filed petition for redetermination before filing delinquent return). Thus, these cases are factually distinguishable from Lundy's case, and for this reason, we do not discuss them here.

Contrary to this recent trend, we emphasize that the IRS, until 1992, had *always* treated § 6512(b)(3)(B) as providing a three-year refund period where the taxpayer filed a tax return and a claim for refund after the IRS mailed the notice of deficiency. Only recently has the IRS interpreted § 6512(b)(3)(B) to provide only a two-year refund period in a situation like Lundy's. In fact, the Commissioner's February 19, 1991 answer to Lundy's petition for redetermination did not argue that his claim for refund was time-barred. Furthermore, the IRS sent Lundy a letter on February 3, 1992, informing him that he should either have received his refund check or should expect it soon. The IRS seemed ready to pay Lundy his refund prior to March 17, 1992, when the Commissioner moved to amend its answer and argued for the first time that the Tax Court did not have the authority to grant Lundy his refund. We suspect that the IRS's interpretation of § 6512(b)(3)(B) originated sometime in 1991 or 1992. Furthermore, the IRS's literature does not explain that a taxpayer who receives a notice of deficiency more than two years after the due date of tax returns and who subsequently files a tax return cannot claim a refund in the Tax Court.

The Tenth Circuit has explicitly followed the Tax Court's interpretation of § 6512(b)(3)(B) in a case with facts identical to Lundy's situation. *Richards v. Commissioner*, 37 F.3d 587 (10th Cir.1994).[12] Other

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[12] In cases with identical facts, the Second and Sixth Circuits have affirmed, without publishing an opinion, the Tax Court's interpretation of § 6512(b)(3)(B). *Allen v. Commissioner*, 99 T.C. 475 (1992), *aff'd* 23 F.3d 406 (6th Cir.1994)

circuits have followed the interpretation of § 6512(b)(3)(B) in other factual circumstances. See *Galuska v. Commissioner*, 5 F.3d 195 (7th Cir.1993) (applying two-year limitation under § 6512(b)(3)(B) where taxpayer filed petition in Tax Court four and one-half years after the due date for tax returns and one and one-half years after receiving the notice of deficiency); *Miller v. United States*, 38 F.3d 473 (9th Cir.1994) (recognizing that two-year limitation would have applied under § 6512(b)(3)(B) although taxpayer filed claim for refund in a United States district court and § 6511 applied); *Anderson v. Commissioner*, No. 93-2501, 1994 WL 483413 (4th Cir. Sept. 8, 1994) (applying two-year limitation under § 6512(b)(3)(B) where taxpayer filed petition in Tax Court more than three years after the due date for tax returns although only three months from receiving notice of deficiency). Because we depart from those circuits, we find it necessary to discuss their decisions.

The Seventh Circuit construed § 6512(b)(3)(B) in *Galuska v. Commissioner*, 5 F.3d 195 (7th Cir.1993). In that case, Galuska's 1986 income tax return was due on April 15, 1987. On April 15, 1987, he filed for an extension of time to file his tax return until August 15, 1987. He also made a payment of $20,000, even though only $3,531 had been withheld during 1986. On August 15, 1987, he filed for another extension until October 15, 1987. However, he did not file a return by that date either. On April 12, 1990, almost three years from the original due date for tax returns, the IRS mailed Galuska a notice of deficiency. On September 19, 1991, over one and one-half years after the mailing of the notice of deficiency, Galuska finally filed his tax return. The return showed that his tax

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(table); *Davison v. Commissioner*, T.C.M. (P-H) 92,709, *aff'd* 9 F.3d 1538 (2d Cir.1993) (table).

liability was only $1,448, and he filed a claim for refund in the Tax Court for his overpayment of $22,083.

The Seventh Circuit held that Galuska could not receive his refund from the Tax Court because he had not paid his taxes within two years of the mailing of the notice of deficiency. The Seventh Circuit interpreted § 6512(b)(3)(B) to mean that Galuska is deemed to have filed his claim for refund in the Tax Court on April 12, 1990, the date of the mailing of the notice of deficiency. Because Galuska had not filed a tax return by April 12, 1990, the two-year limitation period under § 6511(b)(2)(B) applied. If the court had applied the three-year limitation period from the date of the mailing of the notice of deficiency, Galuska would have received his refund.

The Seventh Circuit bolstered its conclusion by noting that Galuska would not have received his refund if he had filed a claim in a district court. *Id.* at 197. This is true. Under § 6511(b)(2)(A), Galuska would have received a three-year refund period, plus an extra six months because of the extensions he received. However, Galuska paid his taxes on April 15, 1987, which is more than three years and six months from September 19, 1991, the date he filed his claim for refund.

Nonetheless, we believe that Galuska was correctly decided but for the wrong reason. The Tax Court should have applied a refund period of three years and six months, just as a district court would have, but started the refund period from the date of mailing the notice of deficiency. Because Galuska had paid his taxes on April 15, 1987, which is less than three years and six months from April 12, 1990, the date of the mailing of the notice of deficiency, Galuska should have received his refund.

What makes Galuska a difficult case is that Galuska, after receiving the notice of deficiency,

waited one and one-half years before filing his return. Our interpretation of § 6512(b)(3)(B) raises the specter that a taxpayer, knowing that the three-year refund period will run from the date of the mailing of the notice of deficiency, could wait ten or twenty years before filing a tax return and claiming his refund in Tax Court.

The Code, however, already prevents a taxpayer from delaying for so long. Section 6213(a) of the Code requires a taxpayer to file a petition for redetermination within 90 days of the mailing of the notice of deficiency. 26 U.S.C. § 6213(a). Section 6512(a) also requires the taxpayer to file a petition within the 90-day time period prescribed by § 6213(a). Thus, a taxpayer cannot delay for ten or twenty years and expect to collect his refund. If the taxpayer does not file a petition for redetermination[13] within 90 days of the mailing of the notice of deficiency, the taxpayer cannot invoke the jurisdiction of the Tax Court in the first place.

The Seventh Circuit should have disposed of Galuska under § 6213(a). If Galuska had filed a tax return and a petition for redetermination anytime between April 12, 1990 and July 12, 1990, he should have received his refund. However, Galuska delayed until September 19, 1991. The Tax Court should have found Galuska's petition to be untimely under § 6213(a) and not reached the issue of the refund period under § 6512(b)(3)(B).

The Tenth Circuit recently construed § 6512(b)(3)(B) in a case with facts identical to that of Lundy. In *Richards v. Commissioner*, 37 F.3d 587 (10th Cir.1994), Richards's 1987 income tax return was due on April 15, 1988. However, Richards never filed a return, and on October 22, 1990, the IRS mailed a

[13] If the taxpayer wants to file a claim for refund in the Tax Court, he would include it in his petition for redetermination.

notice of deficiency. On January 23, 1991, Richards filed a tax return showing an overpayment of income tax. Richards filed a claim for refund in the Tax Court.

The Tenth Circuit held that, under § 6512(b)(3)(B), Richards was deemed to have filed her claim for refund on October 22, 1990, the date of the mailing of the notice of deficiency. Because Richards did not file a tax return until January 23, 1991, the Tenth Circuit applied the two-year refund period under § 6511(b)(2)(B). Because Richards paid her taxes on April 15, 1988, more than two years before the date of the mailing of the notice of deficiency (October 22, 1990), the Tenth Circuit concluded that the Tax Court did not have the authority to grant Richards her refund.

For the reasons stated above, we disagree with the decision of the Tenth Circuit in *Richards* and refuse to follow it.

Although the facts in *Miller v. United States*, 38 F.3d 473 (9th Cir.1994), differ significantly from the case before us, we feel the need to discuss the Ninth Circuit's dicta regarding § 6512(b)(3)(B). In *Miller*, Robin and Diane Miller failed to file a joint return for the tax year 1986 on April 16, 1987. The IRS mailed the Millers a notice of deficiency on August 23, 1989. On April 16, 1990, the Millers mailed their 1986 tax return, which claimed a refund. The IRS received the tax return on April 18, 1990. The filing, however, was deficient because it lacked a necessary schedule and because a photocopy was sent instead of an original. The Millers filed a corrected return in February 1991. The IRS, however, issued a notice of disallowance of claim on May 23, 1991. The Millers filed an action in a United States District Court for the Western District of Washington in April 1992. Unlike Lundy, the Millers chose to sue in a district court instead of the Tax Court.

Because the Millers sued in a district court, § 6511 applied. The Millers are deemed to have paid their taxes on April 15, 1987. The Millers filed a claim for refund with the tax return, but it is not immediately clear whether they filed their tax return on April 16, 1990, when they mailed their original tax return; on April 18, 1990, when the IRS received the original tax return; or in February 1991, when the Millers filed a corrected tax return. The Ninth Circuit, however, did not address this issue.

Instead, the Ninth Circuit construed § 6511(a) to hold that the Millers' claim was untimely. Section 6511(a) provides:

> Claim for credit or refund of an overpayment of any tax . . . shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid.

26 U.S.C. § 6511(a). The Ninth Circuit interpreted this provision to mean that a taxpayer who has not filed a tax return has two years to file a claim for refund. If the taxpayer has not filed a tax return as of two years after the date of payment of taxes, any claim for refund is untimely. 38 F.3d at 475. The Ninth Circuit reasoned:

> Section 6511 has as its purpose foreclosing untimely claims. If the [three-year] clock were to run only from the filing of the return, no claim would ever be barred as long as the return was not filed. This result is precluded by the statutory insistence that a claim be filed within two years after the payment of the taxes "if no return was filed by the taxpayer." The point at which one must determine whether a return has or has not

> been filed, for purposes of that clause, must be two years after payment. Otherwise, no claim could ever finally be barred by the two-year-after-payment clause because the taxpayer could at any time file a return and have three more years to assert the claim. . . . To hold that any return, no matter how delinquent, starts the three-year period would not only nullify part of § 6511, but also reward taxpayers for delaying the filing of their returns.

Id. at 475-76. We do not agree with the reasoning of the Ninth Circuit. A taxpayer, under § 6511(a), has three years from the date of the filing of even a delinquent tax return to file a claim for refund. This provision, however, gives no extra advantage to delinquent taxpayers. If the delinquent taxpayer does not file a tax return and a claim for refund within three years of the payment of taxes, the taxpayer will be prohibited from collecting a refund under § 6511(b)(2). Section 6511, read as a whole, does provide for the foreclosing of untimely claims. However, we read § 6511 to provide even delinquent taxpayers with three years to file their claims before losing them forever.

To bolster its misreading of § 6511(a), the Ninth Circuit argued that the Millers' claim would have been denied if they had filed in Tax Court instead of district court. The Ninth Circuit argued that, under § 6512(b)(3)(B), the relevant limitation period is that which would apply if a claim for refund had been filed on the date of the mailing of the notice of deficiency. Because Lundy had not filed a tax return on that date, the Ninth Circuit argued that the Tax Court would have applied a two-year limitation period. Because the notice of deficiency was mailed more than two years after the Millers paid their taxes, the Tax Court would have denied the refund.

According to the Ninth Circuit, the fact that the two-year period would apply in the Tax Court justified the application of two-year limitation in the district court. "The taxpayer is not supposed to derive an advantage by choosing one forum over another." *Id.* at 476. We agree that the Millers should have had the same period of time to file a claim for refund in the Tax Court that they had in the district court. However, we believe that they had three years from the payment of taxes to file their claim for refund. We disagree with the Ninth Circuit's interpretation of both § 6511(a) and § 6512(b)(3)(B).

Finally, our own Court has recently interpreted § 6512(b)(3)(B) in *Anderson v. Commissioner*, No. 93-2501, 1994 WL 483448 (4th Cir. Sept. 8, 1994) (per curiam) (unpublished). In *Anderson*, the Andersons did not file joint tax returns for 1986 and 1987 income taxes on April 15, 1987 and April 15, 1988, respectively, when they were due. On September 19, 1990, the Commissioner of Internal Revenue mailed notices of deficiency for the 1986 and 1987 tax years to Ann Anderson. On November 14, 1990, the Commissioner mailed notices of deficiency for the 1986 and 1987 tax years to Vernon Anderson. On December 12, 1990, the Andersons filed a petition for redetermination in the Tax Court. However, the Andersons had not filed tax returns on the date they filed their petition; they filed their tax returns on April 10, 1992.

This Court correctly held that the Tax Court did not have the authority to order a refund, even though the Andersons overpaid their taxes. The Tax Court correctly applied a two-year refund period because on the date that the Andersons actually filed their petition for redetermination, they had not yet filed a tax return. (It is insignificant that they had not filed a tax return on the date of the mailing of the notice of deficiency.) Because the Andersons had not paid

their taxes within two years of September 19, 1990, the date of the mailing of the notice of deficiency, the Tax Court could not grant a refund.

The facts of *Anderson*, however, are different from Lundy's case. Lundy filed his tax return on the same day he petitioned the Tax Court. Under these circumstances, the three-year refund period should have applied, and the Tax Court should have granted Lundy his refund.

VI.

We hold that the Tax Court should have applied the three-year refund period in Lundy's case. Because Lundy paid his taxes within three years prior to the date of the mailing of the notice of deficiency, the Tax Court had the authority to determine the amount of Lundy's overpayment of tax and to order a refund. We therefore reverse and remand the decision of the Tax Court.[14]

REVERSED AND REMANDED.

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[14] We deny as moot the Commissioner's motion to strike Lundy's second supplemental brief. At oral argument, we granted Lundy leave to file a second supplemental brief for the limited purpose of addressing the Ninth Circuit's recent decision in *Miller v. United States*, 38 F.3d 473 (9th Cir.1994). The Commissioner has moved to strike this brief because less than four pages of the 18-page brief discusses the *Miller* opinion. We have considered that portion of the brief that addresses the *Miller* opinion and have discussed that case in our opinion. So far as that part of the supplemental brief that refreshes the arguments in Lundy's original briefs, we regard such part as immaterial. Because of this pending motion, the Commissioner has not filed a response to Lundy's second supplemental brief. As our opinion makes clear, however, the *Miller* case is only marginally relevant to the case before us, and we do not find it necessary to delay filing our opinion because of the Commissioner's outstanding motion or because the Commissioner has not yet filed a response to Lundy's second supplemental brief.

APPENDIX B

UNITED STATES TAX COURT

T.C. Memo. 1993-278
No. 29009-90

ROBERT F. LUNDY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Filed June 28, 1993

P overpaid his 1987 Federal income tax through withholding. P's period for filing his 1987 income tax return was extended to Aug. 15, 1988. R mailed a notice of deficiency to P on Sept. 26, 1990. P filed a 1987 income tax return on Dec. 28, 1990, claiming an overpayment.

Held: Under sec. 6512(b)(3)(B), I.R.C. 1986, the statute of limitations on credit or refund of a tax overpayment determined by the Tax Court requires application of rules to facts existing at the date of the mailing of the notice of deficiency. If no tax return had been filed by that date, then the "look-back" period as to an overpayment determined by the Tax Court is the 2 years immediately preceding the mailing of the notice of deficiency. Sec. 6511(b)(2)(B), I.R.C. 1986. P's tax payments were made more than 2 years before the notice of deficiency was mailed, and so P is not entitled to credit or refund of the amount by which he overpaid his 1987 income tax.

MEMORANDUM FINDINGS OF FACT AND OPINION

CHABOT, Judge:

Respondent determined a deficiency in Federal individual income tax against petitioner for 1987 in the amount of $13,806, and additions to tax under section 6651(a)[1] (failure to file) in the amount of $1,502.25, section 6653(a)(1)(A) (negligence, etc.) in the amount of $690.30, and section 6653(a)(1)(B) in the amount of 50 percent of the interest on $6,009.

After concessions by both sides,[2] the issue for decision is whether petitioner is barred by the time limitations under sections 6511 and 6512 from obtaining from this Court a determination that he has an overpayment of his 1987 Federal individual income tax.

FINDINGS OF FACT

Some of the facts have been stipulated. The stipulations and stipulated exhibits are incorporated herein by this reference.

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[1] Unless indicated otherwise, all section references are to sections of the Internal Revenue Code of 1986 as in effect for 1987; references to secs. 6511 and 6512 are to those sections of the Internal Revenue Code of 1986 as in effect for the date on which respondent mailed the notice of deficiency.

[2] The parties agree that petitioner has a deficiency of $778, that he is liable for an addition to tax under sec. 6653(a)(1)(A) in the amount of $369, see sec. 6653(c)(1), and that he is not liable for additions to tax under secs. 6511(a) and 6653(a)(1)(B). Respondent's sec. 6651(a) concession preceded this Court's opinion in *Patronik-Holder v. Commissioner*, 100 T.C. ___ (1993); respondent's concession in the instant case is consistent with our opinion in *Patronik-Holder*, even though it conflicts with the position respondent took in *Patronik-Holder*.

When the petition was filed in the instant case, petitioner resided in Lorton, Virginia.

In early 1980 petitioner's briefcase, containing records necessary for preparing his income tax returns, was stolen. Petitioner told respondent's employees about this situation, and was told that if petitioner intended to claim a refund, then he had 3 years in which to file his return and claim the refund. Petitioner filed his income tax return for that year almost 3 years late, and he also filed some other income tax returns almost 3 years late during the 1980's. On several occasions in the 1980's one or another agent of respondent told petitioner that he had 3 years in which to file a claim for refund, but that petitioner should get his income tax returns filed as soon as possible.

In 1987 Federal individual income taxes were withheld from the income of petitioner and his then wife, Carol A. Lundy (hereinafter sometimes referred to as Carol), in the amount of $10,131.11 (petitioner—$7,797.31; Carol—$2,333.80). No later payments were made on this account. Petitioner timely requested an automatic extension of time to file his tax return for 1987; the filing period was extended to August 15, 1988. From 1988 through 1990 petitioner had health problems, was hospitalized after a car accident, dealt with various family problems, and was involved in a divorce. On June 4, 1990, respondent sent a letter to petitioner stating that if respondent did not hear from petitioner within 30 days, then respondent would prepare a substitute return for 1987 for petitioner. In response, on July 3, 1990, petitioner wrote to respondent stating that he had not yet filed his 1987 income tax return, but that he would "file within the three year period to claim [his] refund". From June 1988 until September 1990, respondent contacted petitioner twice about his 1987 Federal income tax return. Each time respondent asked petitioner to file

his tax return "as soon as possible". On these occasions, respondent did not tell petitioner that he did not have to file his 1987 tax return for 3 years.

On September 26, 1990, respondent mailed to petitioner a notice of deficiency for 1987.

Petitioner and Carol submitted to respondent a joint 1987 tax return dated December 22, 1990. Respondent received this tax return on December 28, 1990. On this 1987 tax return, petitioner and Carol[3] reported adjusted gross income of $76,485, income tax liability of $6,594, and income tax withheld of $10,131, and claimed a refund of $3,537. Petitioner had not previously filed a Federal 1987 income tax return.

On December 28, 1990, petitioner filed a petition in the Tax Court. Respondent filed the answer on February 19, 1991. From March 1991 to January 1992, petitioner was involved in negotiations, both in person and on the phone, with respondent's Appeals officer. On February 3, 1992, respondent sent to petitioner and Carol a letter stating that petitioner and Carol would receive a refund of 1987 taxes in the amount of $3,537, the amount claimed on the late-filed tax return.

On March 17, 1992, respondent moved for leave to amend the answer to assert, for the first time, that petitioner's claim for refund is barred by the statute of limitations. After a hearing, this motion was granted on March 30, 1992.[4]

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[3] Petitioner and Carol may file a joint income tax return after the notice of deficiency has been mailed. *Phillips v. Commissioner*, 86 T.C. 433 (1986), affd. on this issue and revd. on another issue 851 F.2d 1492, 1496-1498 (D.C. Cir. 1988). This is why the opinion and the stipulations take Carol's income and withholding into account even though the notice of deficiency was addressed only to petitioner.

[4] As we have noted, sec. 6512(b) includes words suggesting that this statute of limitations may be jurisdictional. *Woody v.*

Petitioner's and Carol's correct tax liability for 1987 is $7,372;[5] they are overwithheld in the amount of $2,390.11.[6]

OPINION

Petitioner's and Carol's, see *supra* note 3, 1987 taxes were paid more than 2 years before respondent mailed the notice of deficiency to them (Sept. 26, 1990), and less than 3 years before petitioner and Carol filed their 1987 tax return (Dec. 28, 1990).

Petitioner contends that, under section 6511(b)(2)(A), he is entitled to recover an overpayment of income tax paid within 3 years before he made his claim for overpayment and that the claim was the 1987 tax return that he and Carol filed. Respondent contends that the combined effect of sections 6512(b)(3)(B) and 6511(b)(2)(B) is that petitioner is entitled to recover only those payments made within 2 years before the notice of deficiency was mailed. Petitioner responds that respondent's analysis gives respondent the right to cut off a portion of petitioner's statutory limitations period. Respondent answers that that is the result of the plain language of the statute.

We agree with respondent.

Commissioner, 95 T.C. 193, 204 (1990); *Hollie v. Commissioner*, 73 T.C. 1198, 1205 n.9 (1980).

[5] The $7,372 stipulated liability, less the $6,594 liability that petitioner and Carol reported on their late-filed tax return, results in the stipulated $778 deficiency. See *supra* note 2.

[6] The overwithholding is calculated by adding the negligence addition, *supra* note 2, to petitioner's and Carol's tax liability ($7,372 + $369 = $7,741) and subtracting that sum from the amount withheld ($10,131.11 - $7,741 = $2,390.11).

A. Statutory Analysis

Section 6511[7] provides the general statute of

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[7] Sec. 6511 provides, in pertinent part, as follows:

SEC. 6511. LIMITATIONS ON CREDIT OR REFUND.

(a) Period of Limitation on Filing Claim.—Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. * * *

(b) Limitation on Allowance of Credits and Refunds.—

(1) Filing of claim within prescribed period.—No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period.

(2) Limit on amount of credit or refund.—

(A) Limit where claim filed within 3-year period.—If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return. * * *

(B) Limit where claim not filed within 3-year period.—If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.

limitations for credits or refunds. Section 6512[8] provides a special rule for credits or refunds "in case

(C) Limit if no claim filed.—If no claim was filed, the credit or refund shall not exceed the amount which would be allowable under subparagraph (A) or (B), as the case may be, if claim was filed on the date the credit or refund is allowed.

[8] Sec. 6512 provides, in pertinent part, as follows:

SEC. 6512. LIMITATIONS IN CASE OF PETITION TO TAX COURT.

(a) Effect of Petition to Tax Court.—If the Secretary has mailed to the taxpayer a notice of deficiency under section 6212(a) (relating to deficiencies of income, estate, gift, and certain excise taxes) and if the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a) * * *, no credit or refund of income tax for the same taxable year, * * * to which such petition relates, in respect of which the Secretary has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of the tax shall be instituted in any court except—

(1) As to overpayments determined by a decision of the Tax Court which has become final; * * *

* * * * * * *

(b) Overpayment Determined by Tax Court.—

(1) Jurisdiction to determine.—Except as provided by paragraph (3) and by section 7463, if the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of income tax for the same taxable year, * * * in respect of which the Secretary determined the deficiency, or finds that there is a deficiency but that the taxpayer has made an overpayment of such tax, the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Tax Court has become final, be credited or refunded to the taxpayer.

of petition to Tax Court". Section 6512(a)(1) permits suits by taxpayers for the recovery of any part of the tax "As to overpayments determined by a decision of the Tax Court which has become final". Section 6512(b)(1) provides that "Except as provided by paragraph (3)" the Tax Court may determine an overpayment, which shall be credited or refunded. Section 6512(b)(3)[9] provides that there shall not be a credit or refund of any portion of the tax unless that portion was paid during one of three time periods. The only one of these periods that petitioner contends is applicable is the one in section 6512(b)(3)(B).

Section 6512(b)(3)(B) permits a credit or refund if the Court determines that the tax was paid—

within the period which would be applicable under section 6511(b)(2), (c), or (d), if on the date of the mailing of the notice of deficiency a claim had

* * * * * * *

(3) Limit on amount of credit or refund.—No such credit or refund shall be allowed or made of any portion of the tax unless the Tax Court determines as part of its decision that such portion was paid—

* * * * * * *

(B) within the period which would be applicable under section 6511(b)(2), (c), or (d), if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating the grounds upon which the Tax Court finds that there is an overpayment, * * *

[9] Many prior opinions refer to sec. 6512(b)(2). However, sec. 6244(a) of the Technical and Miscellaneous Revenue Act of 1988 (TAMRA), Pub. L. 100-647, 102 Stat. 3342, 3750, redesignated sec. 6512(b)(2) as sec. 6512(b)(3), effective for overpayments determined by the Tax Court which had not been refunded on the 90th day after Nov. 10, 1988. TAMRA sec. 6244(c).

> been filed (whether or not filed) stating the grounds upon which the Tax Court finds that there is an overpayment, * * *

Both sides agree that subsections (c) and (d) of section 6511 do not affect the instant case, and that our focus should be on section 6511(b)(2). We arrive at section 6511(b)(2) because we have been instructed to go there by section 6512(b)(3)(B). See *Gunther v. Commissioner*, 92 T.C. 39, 61-63 (1989), affd. 909 F.2d 291 (7th Cir.1990). The instruction in section 6512(b)(3)(B) directs us to focus on the situation as it would have been on a specified date—the date of the mailing of the notice of deficiency. Thus, this provision requires us to "take a snapshot" of the situation as of September 26, 1990. With that in mind, we proceed to section 6511(b)(2).

Section 6511(b)(2) has three subparagraphs, each providing what has been referred to as a "look-back" rule. (See our recent comment in *Allen v. Commissioner*, 99 T.C. 475, 478-479 n. 5 (1992), on appeal (6th Cir., Feb. 16, 1993), noting the difference between the look-back periods described in section 6511(b)(2) and the period for filing a claim described in section 6511(a).) The dispute centers on whether subparagraph (A) or (B) of section 6511(b)(2) applies. Neither side contends that subparagraph (C) applies.

Section 6511(b)(2)(A) provides the rule for the situation where "the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a)". For any tax "in respect of which tax the taxpayer is required to file a return", section 6511(a) prescribes only the period "within 3 years from the time the return was filed". On September 26, 1990, the deemed-claim date, petitioner's and Carol's 1987 tax return had not been filed, so there was no "3-year period prescribed in subsection (a)". Because there was no 3-year period as prescribed in section 6511(a),

no claim had been filed within that 3-year period. Therefore, section 6511(b)(2)(A) cannot provide the rule for decision in the instant case.

Section 6511(b)(2)(B) provides the rule for the situation where the claim was filed, but not within the 3-year period prescribed in section 6511(a). This is the situation in the instant case. That is, section 6512(b)(3)(B) directs us to make a determination assuming that a claim for credit or refund was filed on September 26, 1990 (the date the notice of deficiency was mailed), but no tax return had been filed by that date, so the deemed claim for credit or refund was not filed within the 3-year period prescribed in section 6511(a). In this situation, section 6511(b)(2)(B) provides a 2-year look-back period. That is, "the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim." Petitioner's and Carol's 1987 income taxes were paid entirely by withholding in 1987, and so were deemed paid on April 15, 1988. Sec. 6513(b)(1). April 15, 1988, is more than 2 years before September 26, 1990. Thus, no portion of petitioner's and Carol's 1987 income taxes was paid within the 2-year period immediately before September 26, 1990.

We conclude from the foregoing that petitioner is not entitled to a determination from this Court that he has an overpayment that can be credited or refunded. This conclusion is consistent with a long line of Tax Court precedents, among the most recent of which are *Patronik-Holder v. Commissioner*, 100 T.C. ____ (1993); *Allen v. Commissioner*, *supra*; *Galuska v. Commissioner*, 98 T.C. 661 (1992); and *Berry v. Commissioner*, 97 T.C. 339 (1991).

Petitioner contends that the concept of a "deemed claim" is not found in section 6512(b)(3)(B). We disagree. The language "if on the date of the mailing of the notice of deficiency a claim had been filed

(whether or not filed)" specifically directs this Court to assume a claim had been filed—a deemed-claim concept.

Petitioner also contends that the deemed claim should include a "deemed return". Again, we must disagree. Although one document could serve both functions—be a tax return and also be a claim for credit or refund—it does not follow that "tax return" and "claim for credit or refund" are interchangeable terms. In section 6511(a), the Congress uses the term "return" three times and the term "Claim for credit or refund" twice in close juxtaposition. From this, we conclude that the Congress understood there was a difference between a tax return and a claim for credit or refund. In section 6512(b)(3)(B), the application of which depends in part on section 6511(a), the Congress refers to a claim for credit or refund and does not refer to a tax return. From this, we conclude that, although section 6512(b)(3)(B) embodies a deemed-claim concept, it does not embody a deemed-return concept.

Petitioner also contends that our interpretation of section 6512(b)(3)(B) effectively causes the phrase "no return" in section 6511(a) to mean "no timely return". We do not agree that our interpretation creates this result. The interplay of section 6512(b)(3)(B) and section 6511(b)(2) requires that, if the taxpayer files a timely petition with the Tax Court, then the tax return must have been filed before the notice of deficiency was mailed in order for a taxpayer to have the 3-year look-back under section 6511(b)(2)(A). In the instant case, if petitioner had filed his untimely tax return 2 years late, he would have been entitled to the benefit of the 3-year look-back. For purposes of the deemed claim for credit or refund, there is no requirement that the tax return be "timely" in the sense of having been filed by the due date (or extended due date) thereof.

Petitioner also contends that our interpretation of section 6512(b)(3)(B) amounts to a penalty to a taxpayer who files a late return. Petitioner contends that the Congress enacted section 6651 to provide an addition to tax for a late-filed return. However, a statute of limitations does not provide for a "penalty"; rather, "a statute of limitation is an almost indispensable element of fairness as well as of practical administration of an income tax policy." *Rothensies v. Electric Battery Co.*, 329 U.S. 296, 301 (1946); *Texas Co. (Caribbean) Ltd. v. Commissioner*, 12 T.C. 925, 930 (1949). A limitation on the recovery of an overpayment resulting from a late-filed tax return is not inconsistent with an addition to tax imposed on account of an unwarranted failure to file a timely tax return.

We conclude that, as a matter of statutory analysis, petitioner is not entitled to the relief he seeks from this Court.

B. Other Considerations

Petitioner contends that, if he had filed a claim for refund in a District Court or in the Court of Federal Claims, then either of those courts would have had jurisdiction, under section 6511, to refund his overpayment. Petitioner contends that the Congress did not intend a different result for a taxpayer who elects to file a petition in Tax Court and thereby invokes section 6512. Petitioner contends that the Congress did not intend to create a "jurisdictional asymmetry" when it enacted section 6512(b)(3)(B). Petitioner contends that the Congress did not intend to empower respondent to unilaterally shorten the period for filing a claim, by mailing a notice of deficiency. Petitioner contends that section 6512(b)(3)(B) should be construed in the context of section 6511. In support of his contentions, petitioner points to the legislative history of section 6511.

Petitioner contends that respondent's administrative practice should affect our reading of the statute. Petitioner contends that respondent's employees acted in such a way as to mislead petitioner, and so respondent should be estopped to deny the allowability of the credit or refund.

We consider these contentions seriatim.

1. Other Courts

Several of petitioner's contentions are based on the idea that a holding for respondent in the instant case would disturb an existing symmetry (at least as to statutes of limitations) among the different forums to which petitioner could have brought his dispute.

Before maintaining a refund suit, the taxpayer must file a claim for credit or refund. Sec. 7422(a). This claim must be filed timely, in accordance with the statute of limitations. Sec. 6511. The doctrine of "variance" imposes potentially severe restrictions on the taxpayer, with the result that the statute of limitations operates not only to bar late-filed claims, but even to bar grounds for recovery at variance with those initially asserted in timely claims. One well-known text, Junghans & Becker, Federal Tax Litigation (2d ed. 1992), summarizes the doctrine as follows:

> The single most important component of every claim for refund is the taxpayer's statement of the grounds for recovery, which provides the basis for the issues the taxpayer can raise in his refund suit. Grounds for recovery not asserted in the refund claim generally cannot be raised and relied on by the taxpayer in subsequent litigation. The special defense of "variance" is available to the government if a taxpayer, at trial, seeks to rely on a ground not included in the refund claim. [*Id.* par. 16.03[2][e], at 16-20; fn. ref. omitted.]

* * * * * * *

> A claim for refund is a jurisdictional prerequisite to filing a refund suit. As a result, in a refund suit, the taxpayer's grounds for recovery are limited to those grounds set forth in the claim for refund on which the suit is based. A corollary to this rule is that a taxpayer may not advance a ground or legal theory in his refund suit that is entirely different from any ground or legal theory advanced in his claim for refund. Where a taxpayer in a refund suit seeks recovery on grounds not presented in his claim, a fatal variance exists and his action is subject to dismissal. [*Id.* par. 18.02[3], at 18-11; fn. refs. omitted.]

See, *e.g.*, *Charter Co. v. United States*, 971 F.2d 1576, 1579 (11th Cir.1992); *Beckwith Realty, Inc. v. United States*, 896 F.2d 860, 862-863 (4th Cir.1990).

By contrast, section 6512(b)(3)(B) provides that the taxpayer in the Tax Court gets the benefit of a deemed claim "stating the grounds upon which the Tax Court finds that there is an overpayment". Thus, the variance restriction on the statute of limitations for credits or refunds applies in refund suits, but does not apply in the Tax Court.

On the deficiency side, too, the statute of limitations applies differently in the Tax Court. Section 6214(a) authorizes the Tax Court to redetermine a deficiency in an amount greater than that determined in the notice of deficiency, "if claim therefor is asserted by the Secretary at or before the hearing or a rehearing." The statute of limitations on assessments and collections is suspended if a Tax Court petition is filed. Sec. 6503(a).

However—

> The statute of limitations is not suspended by suit in a refund forum, and the government cannot assess any deficiency more than three years after the filing of the relevant tax return unless the assessment is for fraud or one of the other events that extends the normal limitations period. Because the taxpayer almost always can delay the filing of a refund suit until after the expiration of the limitations period on assessments, this shield is usually available to any taxpayer in the refund forums. The government, of course, can raise new issues in tax refund suits. However, if the statute of limitations on assessments has run, these new issues may be used only to offset the taxpayer's eventual recovery. The new issues cannot result in a net recovery for the government. * * * [Junghans & Becker, *supra* par. 3.06, at 3-16; fn. ref. omitted.]

Thus, there clearly are differences between the application of the statutes of limitations to Tax Court proceedings and the application to refund proceedings in other courts. In general, the rules operate so that, in a proceeding properly brought in the Tax Court, the parties are permitted (subject to our motion practice considerations) to present matters that they could have presented at the date the notice of deficiency was mailed. On the other hand, in refund suits the statutes of limitations grind on and both sides are limited to the amounts (and the taxpayer is even limited to the grounds for recovery) established when the limitations period expired. Our reading of the statute in the context of the instant case—that the controlling factor is the facts on the date the notice of deficiency was mailed—is not rebutted by petitioner's contentions about symmetry among the courts.

2. Legislative History

Petitioner points us to legislative history involving revision of section 322(b)(2) of the Internal Revenue Code of 1939 by section 6511(a) when the Internal Revenue Code of 1954 was enacted, together with the further revision of section 6511(a) by the Technical Amendments Act of 1958. Petitioner also points us to legislative history of 1954 and 1958 to show a congressional intent to have uniformity between the 3-year assessment rule of section 6501(a) and the 3-year claim-for-credit-or-refund rule of section 6511(a).

It is well established that we may look to the legislative history of a statute where the statute is ambiguous. In addition, we may seek out any reliable evidence as to legislative purpose even where the statutory language appears to be clear. *United States v. American Trucking Associations*, 310 U.S. 534, 543-544 (1940); *U.S. Padding Corp. v. Commissioner*, 88 T.C. 177, 184 (1987), affd. 865 F.2d 750 (6th Cir.1989); *Huntsberry v. Commissioner*, 83 T.C. 742, 747-748 (1984); *J.C. Penney Co. v. Commissioner*, 37 T.C. 1013, 1017 (1962), affd. 312 F.2d 65 (2d Cir.1962). Where a statute appears to be clear on its face, we require unequivocal evidence of legislative purpose before construing the statute so as to override the plain meaning of the words used therein. *Huntsberry v. Commissioner*, 83 T.C. at 747-748; see *Pallottini v. Commissioner*, 90 T.C. 498, 503 (1988), and cases there cited.

When section 6511 was enacted in 1954 as part of the revision that became the Internal Revenue Code of 1954, it measured the period for filing a claim as ending 3 years from the time the tax return was required to be filed (determined without regard to any extension of time), or 2 years from the time the tax was paid, whichever ended later. Section 82(a) of the Technical Amendments Act of 1958, Pub.L. 85-866, 72

Stat. 1606, 1663, amended section 6511(a) to provide that the period for filing a claim for refund was measured from the filing of the return, rather than the time the return was required to be filed. The Senate Finance Committee report, S. Rept. 1983, 85th Cong., 2d Sess. 98-99 (1958), 1958-3 C.B. 922, 1019-1020, states as follows:

> *(a) Period for filing claim.*—Under present law a claim, to be valid, must in general be filed within 3 years from the due date of the return, without regard to any period of extension granted for the filing of the return (or within 2 years from the time of tax payment, whichever is later). However, the rule with respect to assessments is that the period of limitation is 3 years from the date the return was actually filed, whether or not filed when it was due. To correlate these rules the House bill (by amending sec. 6511(a)) provides that a claim for refund or credit of any tax may be filed within 3 years from the time the return was actually filed (or, as under present law, within 2 years from the time of payment, whichever is later). Your committee has accepted this change.
>
> *(b) Limit on credit or refund.*—Present law as one alternative provides that the amount of any credit or refund allowed cannot exceed the portion of the tax paid within a period of 3 years immediately preceding the filing of the claim. To correspond with the amendment described above, the House bill provides that in such cases the amount to be refunded or credited is not to exceed that portion of the tax which was paid within a period of 3 years preceding the filing of the claim plus the period of any extension of time for filing the return. Your committee has accepted this change.

Under section 6511 as it was from the 1954 Code enactment to the 1958 act, the subsection (b) references to "the 3-year period prescribed in subsection (a)" are references to "3 years from the time the return was required to be filed". Under the "snapshot" analysis we have used, *supra*, the initial 1954 Code language would have resulted in a conclusion that the deemed claim was filed within the 3-year period, and so petitioner would have been entitled to the 3-year look-back under section 6511(b)(2)(A). However, it is clear that the Congress perceived a defect in section 6511(a) as originally enacted, and that the remedy that the Congress enacted in 1958 was intended to work some changes.

The parties have not pointed us to, and we have not found, any legislative history evidence as to whether the Congress analyzed all the changes that their 1958 act amendments caused. Nothing that we see indicates a clear congressional intent that a taxpayer be entitled to a 3-year look-back on the facts of the instant case.

However these arguments may be weighed, one thing that is clear is that the legislative history of section 6511 does not present the unequivocal evidence of legislative purpose that would warrant our construing the statute so as to override the plain meaning of the words used therein. Compare *Estate of Sachs v. Commissioner*, 88 T.C. 769, 772-778 (1987), affd. on this issue and revd. on another issue 856 F.2d 1158 (8th Cir.1988), with *Gunther v. Commissioner*, 92 T.C. 39 (1989), affd. 909 F.2d 291 (7th Cir.1990). We have not found anything in the legislative history of section 6511 that would require us to conclude that the Congress did not mean exactly what it said. See

Cal-Maine Foods, Inc. v. Commissioner, 93 T.C. 181, 215 (1989), and cases there cited.

Accordingly, we conclude that the legislative history does not provide a proper basis for reading the statute in petitioner's favor.

3. Respondent's Administrative Practice

Petitioner contends that respondent has had a longstanding administrative practice of granting refunds where the return is filed within 3 years of the date the tax was paid, and that this practice must be deemed to have been approved by the Congress and to have acquired the force of law. Petitioner relies on respondent's actions in *Domtar Newsprint Sales Ltd. v. United States*, 193 Ct.Cl. 505, 435 F.2d 563 (1970); *Dillard v. Commissioner*, T.C.Memo. 1992-126; *Long v. United States*, 51 AFTR 2d 83-816, 83-1 USTC par. 9155 (D.Mass.1983); Rev.Rul. 76-511, 1976-2 C.B. 428; and Rev.Rul. 57-354, 1957-2 C.B. 913.

The chronology in *Domtar* differs in a critical respect from that in the instant case. In the instant case, petitioner is treated as having filed his claim for credit or refund (on Sept. 26, 1990) *before* he filed his tax return (on Dec. 28, 1990). In *Domtar* the taxpayer filed its claim for credit or refund (on May 14, 1968) *after* it filed its tax return (on May 3, 1968). The Court of Claims analyzed section 6511(a) in *Domtar Newsprint Sales Ltd. v. United States*, 435 F.2d at 566, as follows:

> *The status of a claim for refund must in the final analysis be determined in the light of the facts as they exist at the time it is filed.* Thus, if no return was filed prior to the filing of a claim for refund, the two-year period of limitation is applicable in determining the timeliness of the claim. However, if a return was filed prior to the filing of a claim for refund, the three-year period of limitation governs. [Emphasis added.]

This conclusion as to section 6511(a) is similar to that we have reached for the Tax Court under sections 6512(b)(3)(B) and 6511(b). Thus *Domtar* does not help petitioner; rather, it demonstrates the reasonableness of the approach we have used and the conclusion we have reached in the instant case.

Dillard v. Commissioner, T.C.Memo. 1992-126, involved overpayments through withholding for 1987 and 1988. The taxpayers did not file income tax returns for 1987 or 1988 until October 1991. Respondent mailed a notice of deficiency to the taxpayers on July 11, 1990. The *Dillard* opinion notes that respondent allowed the refund for 1988. Petitioner contends that this illustrates respondent's practice of refunding overpayments where a tax return is filed within 3 years of the time the tax was paid. We conclude that the facts in *Dillard* as to 1988 support respondent's position and illustrate the operation of section 6512. The taxpayers in *Dillard* were deemed to have paid their 1988 taxes on April 15, 1989. In *Dillard* the notice of deficiency operated as the taxpayers' deemed claim for credit or refund. At the time of the deemed claim, the taxpayers had not filed a tax return for 1988, so the 2-year look-back applied. The deemed claim for credit or refund of 1988 taxes was filed (July 11, 1990) within 2 years of the time the tax was deemed paid (April 15, 1989), and so the taxpayers were entitled to a credit or refund for 1988.[10]

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[10] As noted in *Allen v. Commissioner*, 99 T.C. 475, 481-482 (1992), on appeal (6th Cir., Feb. 16, 1993), as to the issue of the refund of 1987 taxes, *Dillard v. Commissioner*, T.C.Memo. 1992-126, contains some language which appears to support petitioner's position. However, that language is not controlling because as to the 1987 overpayment, *Dillard* is distinguishable

In *Long v. United States*, 51 AFTR 2d 83-816, 83-1 USTC par. 9155 (D.Mass.1983), the taxpayers' only claims for credit or refund for the years before the District Court were the claims embodied in their tax returns. There was no notice of deficiency for these years, and so there was no petition to the Tax Court, section 6512 did not apply, and the deemed-claim rule of section 6512(b)(3)(B) was irrelevant. Under these circumstances, the question of a 2-year look-back was not before either the District Court or the Internal Revenue Service. As a result, the Internal Revenue Service's 3-year approach to the facts in *Long* does not help petitioner, because it does not provide a clue as to respondent's administrative practice with respect to the facts of the instant case.

For the same reasons, the two rulings, which do not involve notices of deficiency, do not help petitioner, because they do not illuminate respondent's administrative practice as applicable to the facts before us in the instant case. Indeed, Rev.Rul. 57-354, 1957-2 C.B. 913, may help respondent, because it includes the same language that we have quoted from the Court of Claims opinion in *Domtar Newsprint Sales Ltd. v. United States*, *supra*.

From the foregoing, we conclude that there is no evidence that respondent has had a longstanding administrative practice of granting refunds where, as here, the deemed claim preceded the tax return and was deemed made more than 2 years after the tax was paid.

Petitioner's failure to show the contended-for administrative practice makes it unnecessary to consider petitioner's legislative reenactment doctrine argument. By the same token, it is not necessary to consider petitioner's contention that he

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from the instant case in that in *Dillard* the taxpayer was outside the 3-year look-back period.

was treated differently from similarly situated taxpayers.

4. Estoppel

Petitioner contends that the result in the instant case is the fault of respondent, rather than petitioner. Petitioner contends that he was misled by respondent because he relied on respondent's employees' representations that a taxpayer has 3 years from the time the tax was paid to file a return or claim for credit or refund. Petitioner does not claim that any specific type of estoppel should be applied to respondent. However, his contentions are similar to the equitable estoppel argument which was rejected in *Dillard v. Commissioner*, T.C.Memo. 1992-126, and we also reject it in the instant case. The doctrine of equitable estoppel is applied against the Government only with the utmost caution and restraint. *Boulez v. Commissioner*, 76 T.C. 209, 214-215 (1981), affd. 810 F.2d 209 (D.C.Cir.1987). Petitioner testified that respondent's employees urged him to file his 1987 tax return as soon as possible. As noted in Rev.Rul. 57-354, *supra*, which petitioner relies on for his administrative practice argument, for at least a generation respondent has warned that if a taxpayer files a claim for credit or refund before filing a tax return for that period, then the taxpayer may lose an opportunity to get the credit or refund. Finally, the deemed-claim rule is specifically provided by statute.

There is no basis for an estoppel against respondent in the instant case. See *Miller v. United States*, 949 F.2d 708, 712-713 (4th Cir.1991).

The result of a statute of limitations bar on credit or refund may seem harsh in view of the actual overpayment, *e.g.*, *Allen v. Commissioner*, 99 T.C. at 480; *Berry v. Commissioner*, 97 T.C. 339, 345 (1991). However, the statute is intricate and precise, *e.g.*, *Allen v. Commissioner*, *supra*; see (as to section

6501) *Minahan v. Commissioner*, 88 T.C. 492, 505 (1987). We apply the statute as the Congress enacted it.

We conclude that petitioner is not entitled to a determination that he has an overpayment of 1987 income taxes. To take account of the parties' concessions, *supra* note 2,

Decision will be entered under Rule 155.

No. 94-1785

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

COMMISSIONER OF INTERNAL REVENUE,
PETITIONER
vs.
ROBERT F. LUNDY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

On the Merits:

The issue arises when the taxpayer overpays, usually by IRS overwithholding or by payments of estimated tax, the amount of tax owed, where (1) the taxpayer is delayed in filing his return, (2) the IRS mails a Notice of Deficiency to the taxpayer, (3) the taxpayer subsequently files a tax return claiming a refund within three years of the original due date of his return and (4) the taxpayer subsequently files a petition in the Tax Court seeking a redetermination of the asserted deficiency and a refund of his overpayment.

Whether, under these circumstances, the IRS can shorten the statute of limitations on claiming a refund to less than three years by mailing a Notice of Deficiency to a taxpayer more than two but less than three years from the due date of his return.

Procedurally:

Where the record made and arguments presented were much more complete in *Lundy* and where the IRS is signalling its lack of confidence in its position by attempting to have *Richards* (no. 94-1537) heard to the exclusion of the case which created the conflict, should *Lundy* be stayed pending the resolution of *Richards*, when *Lundy* would provide a better vehicle to correctly resolve this important issue of tax procedure?

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IN THE SUPREME COURT OF THE UNITED STATES

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COMMISSIONER OF INTERNAL REVENUE,
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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-29a) is reported at 45 F.3d 856. The opinion of the Tax Court (Pet. App. 30a-52a) is reported at 65 T.C.M. (CCH) 3011.

JURISDICTION

The judgment of the Court of Appeals was entered on January 30, 1995. The petition for a writ of certiorari was filed on April 30, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The applicable provisions of sections 6511 and 6512 of the Internal Revenue Code, 26 U.S.C. 6511, 6512 are set forth at Pet. 2-3.

STATEMENT OF FACTS

This statement of facts is based on the record in the Tax Court and the Court of Appeals. All "A" references are to pages in the appendix to Taxpayer's main brief in the Court of Appeals. All "C" references are to Addendum C to the brief.

Federal taxes were withheld from the income of Robert F. Lundy (hereinafter "Taxpayer") for the 1987 taxable year. Like many Americans, it was Taxpayer's custom and practice to permit the petitioner (hereinafter "IRS") to overwithhold from his income so that he never owed the IRS any taxes on April 15th and would, in fact, be due a refund. As a consequence he felt no particular guilt or concern about not filing his return on the initial due date. The IRS, during each taxable year and until April 15 of the following year, was using his money without paying interest to him. (A. 68, 82.)

Taxpayer was led to believe, by the IRS officials with whom he dealt, that he had a full three years in which to file his return. Taxpayer had past experience with the IRS on this very subject. Previously he had filed returns claiming a refund near the end of the three year grace period and had received his refund in full. (A. 69-70, 86.)

During the three year period that commenced April 15, 1988, the date on which Taxpayer's return was initially due, Taxpayer suffered a number of personal and health problems. These facts are detailed in the record.

During the period June 1988 until September 1990, the parties conducted correspondence that is typical of correspondence between a citizen and the IRS. The IRS would send Taxpayer a form letter. Taxpayer would reply with a detailed and considered response. The

IRS would send still another form letter which completely ignored the correspondence of Taxpayer. (A. 75-76.)

The IRS computers generated a Notice of Deficiency to Taxpayer on September 26, 1990. (A. 13, 52.) The IRS claimed that (in addition to the $10,131.11 that was withheld from his wages) he owed $13,806 in taxes, plus $2,192.55 in penalties, plus interest thereon. The letter led Taxpayer to believe that he had only two choices, either to pay the amount demanded or to file a petition in the Tax Court. (A. 77.) Nowhere in the Notice, itself, does the IRS explain a taxpayer's option of filing a complaint in a U.S. District Court or the Court of Federal Claims. (A. 16.)

Taxpayer filed his 1987 tax return and then a petition in the Tax Court in December 1990. (A. 13.) On February 15, 1991 the IRS filed its Answer. This Answer did not raise a limitations defense.

Thereafter, the IRS induced Taxpayer to jump through a number of hoops. Since Taxpayer does not wish to ascribe this behavior on the part of the IRS to pure cruelty, he assumes that each of the public officials with whom he dealt believed that he had a full three years in which to file his tax return and that in fact his tax return was timely filed.

On March 12, 1991, the IRS acknowledged that it had been notified of his petition in the Tax Court. (A. 58.) On March 19, 1991, the IRS sent Taxpayer a letter requesting him to gather, organize, and explain more than 150 pages of documents. (A. 55. 59-60.) On May 15, 1991, the IRS sent Taxpayer a letter stating that in order to receive a refund "the Taxpayer must establish that all requirements of the law had been met." (A. 61.) However, this letter did not raise a limitations defense. The only requirement which Taxpayer was asked to meet was to provide evidentiary support for the deductions that he was claiming on his 1987 return. (A. 61.)

During the examination of Taxpayer's return and the negotiations which followed, involving concessions on both sides, Taxpayer and the IRS agreed that a discrepancy of $778.00 existed between the proposed assessment made pursuant to [Taxpayer's 1987] return of

$6,954.00 and the "corrected income tax liability" of $7,372.00. which was deemed to be a "tax deficiency" even though the IRS admitted that income taxes were withheld from the Taxpayer in 1987 in the amount of $10,131.11. In addition, Taxpayer conceded an "addition to tax" of $369.00. (A. 13, 89-90.)

In a conference call with the Tax Court judge, counsel for the IRS indicated that it was her understanding that a settlement had been reached which involved a refund to the Taxpayer. (A. 56.)

On February 3, 1992, the IRS wrote the Taxpayer the following:

> Amount to be refunded to you if you owe no other obligations $3,537.
>
> You may have already received this check. If not, please allow two weeks for it to be mailed to you unless there are other matters pending which could *postpone* your refund. (emphasis added) (A. 62.)

The IRS filed a Motion to Amend its Answer raising the statute of limitations defense, for the first time, on March 17, 1992 (less than five days before the call of the calendar). This motion was granted over Taxpayer's strenuous objection. (A. 88, 112.) The Taxpayer's check is still being "postponed."

A few months later the Commissioner seemed to have changed her mind once again. In a *Washington Post* report that appeared on October 4, 1992, then Commissioner Shirley B. Peterson said that: "... if you have a refund coming, you may lose it. The IRS estimates that a third of non-filers actually have money coming to them. The law says that a refund must be claimed within three years of the date the return was due. If a refund was not claimed, the government gets to keep it." (C. 1-2)

The Fourth Circuit was asked to take judicial notice of the fact that whenever the IRS seeks publicity about the filing season or about its non-filer program, one of the inducements that is offered is that if a citizen is due a refund, he will receive one if he files a tax

return within three years of the due date of the return from which the refund is calculated. For example, in a press release issued in March 1994, the IRS said: "In particular, the IRS urges those expecting refunds to file before it's too late. Nearly one-quarter of late filers who have sent in prior year returns received funds. Though there is no penalty for filing a refund return after the regular April 15 deadline, a refund is lost forever on a return filed more than three years late. That means refunds for 1990 must be claimed by April 15, 1994." (C-19-20.)

Last year, in a report that ran in the *New York Times* on February 27, 1994, the present Commissioner, Margaret Milner Richardson, said: "More than one-third of the nation's nonfilers are owed refunds. To claim a refund, taxpayers must file a return within three years [of the due date of the return]." (C. 6).

The Court of Appeals for the Fourth Circuit reversed the holding of the Honorable Herbert L. Chabot of the Tax Court that the Taxpayer had overpaid his 1987 income tax, but that his overpayment was not refundable on the ground that the statute of limitations had run on the period in which the Tax Court could make such a determination.

ARGUMENT

I. The Issue in *Lundy* is Substantial and Recurring and the Subject of a Direct Conflict Between the Circuits.

The Court of Appeals correctly held that Taxpayer was entitled to a refund of his overpayment under section 6512(b)(1) and was not barred by the limitation of section 6512(b)(3)(B). However, Taxpayer acknowledges that the decision of the Court of Appeals directly conflicts with that rendered by the Tenth Circuit in *Richards v. Commissioner*, 37 F.3d 587 (10th Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3707 (U.S. Mar. 14, 1995) (No. 94-1537) and that the question presented is a recurring one of substantial importance. For reasons set forth in Part III below, Taxpayer asserts that if review is granted in *Richards* and this case, *Lundy v. Commissioner*, 45 F.3d

856 (4th Cir. 1994), *petition for cert. filed*, (U.S. Apr. 30, 1995), *Lundy* should be briefed and argued.

II. Brief Statement on the Merits of the Case.

Section 6511 contains two discrete limitations. Section 6511(a) limits the period during which an administrative claim for refund may be filed with the IRS. Section 6511(b), incorporated by reference in section 6512(b)(3)(B), limits the amount of tax that may be refunded.

Turning first to the limitation on the time for filing a claim contained in section 6511(a), Treas. Reg. § 301.6511(a)-1 provides as follows:

> (1) If a return is filed, a claim for credit or refund of an overpayment must be filed by the taxpayer within 3 years from the time the return was filed or within 2 years from the time the tax was paid, whichever of such periods expires the later.
>
> (2) If no return is filed, the claim for credit or refund of an overpayment must be filed by the taxpayer within 2 years from the time the tax was paid.

Since Taxpayer filed a return, his compliance with the limitation on filing is tested under Treas. Reg. § 301.6511(a)-1. The two requirements in that provision are in the alternative. As Taxpayer did file a return, the alternative which applies to him is clearly the alternative pertaining to a filed return. Taxpayer filed his 1987 tax return on December 28, 1990. The return showing an overpayment also constituted a claim for refund. Treas. Reg. § 301.6402-3(a)(5). Thus, he filed his claim for refund contemporaneously with the return, and, therefore, within three years of the time the return was filed.

Taxpayer, accordingly, has complied with the filing requirements of section 6511(a).

The second limitation, on the amount that can be refunded, is contained in section 6511(b). Since Taxpayer filed his claim for refund within the three-year period described in section 6511(a), the limitation on the amount of the refund applicable to him is contained in section 6511(b)(2)(A). As Treas. Reg. § 301.6511(b)-1(b) states:

> (I) If a return was filed, and a claim is filed within 3 years from the time the return was filed the amount of the credit or refund shall not exceed the portion of the tax paid within the period immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return.

Taxpayer filed his return showing an overpayment on December 22, 1990. Since his return constituted a claim for refund, Treas. Reg. § 301.6402-3(a)(5), the claim was filed contemporaneously with the return and therefore was filed within three years of the return. Therefore, section 6511(b)(2)(A) applied to Taxpayer and he was entitled to a refund of any taxes paid in the three-year period preceding the filing of the claim. Since his taxes were deemed paid by section 6513(b)(1) on April 15, 1988, a date less than three years before December 22, 1990, he was entitled to his refund.

Section 6512(b)(3)(B) states that no refund shall be allowed by the Tax Court unless that court determines that such portion was paid within the period of limitation provided in section 6511(b)(2) "if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating the grounds upon which the Tax Court finds that there is an overpayment."

The net effect of section 6512(b)(3)(B) and section 6511(b) incorporated by reference is that a refund is allowable if on the date the Notice of Deficiency is issued, the taxpayer *could have* filed a timely claim on that date. Where, as here, the Notice of Deficiency precedes the filing of the return/claim for refund, the taxpayer is entitled to his refund if the taxes were paid within three years preceding the mailing of the Notice. The Court of Appeals agreed, stating that the taxpayer should be able to collect a refund due him "if the taxpayer could have filed a return and claimed a refund on the

date the IRS mailed the notice of deficiency." *Lundy* 45 F.3d at 864. This interpretation is supported by the language of the statute, as well as case law, legislative history and well-respected secondary authority submitted by Taxpayer to the Court of Appeals. Since Taxpayer could have filed a timely return on September 26, 1990, the date the notice was issued, he is entitled to his refund.

III. *Lundy* Should be Selected for Briefing and Argument.

If certiorari is granted in *Richards* and *Lundy* Taxpayer submits that *Lundy* should be briefed and argued.[1]

The IRS' petition correctly states that the substantive issue in *Richards* and *Lundy* is identical.[2] The Tenth Circuit in *Richards* concluded that the statute of limitations was only two years and the taxpayer was denied the refund of the taxes she was stipulated to have overpaid. 37 F.3d at 589. The Fourth Circuit in *Lundy* concluded that the statute of limitations was three years and that Taxpayer was entitled to his refund. 45 F.3d at 861. *Richards* and *Lundy* are the only two cases directly in point where a published opinion has been issued by a court of appeals.[3]

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[1]. *Lundy* and *Richards* are procedurally at the same stage so that no delay would result from selecting *Lundy* for briefing and argument.

[2] *See supra* Question Presented on the merits.

[3]. *Davison v. Commissioner*, 9 F.3d 1538 (2d Cir. 1993), *Allen v. Commissioner*, 23 F.3d 406 (6th Cir. 1994), and *Rossman v. Commissioner*, 46 F.3d 1144 (9th Cir. 1995) were reported as table decisions and under the rules of those courts are not precedential and should not be cited as such. *See, e.g.*, 2d Cir. R. 0.23. *Galuska v. Commissioner*, 5 F.3d 195 (7th Cir. 1993), is not in point. Galuska did not file within three years and the court's reference to the two-year limitation was dictum as to that taxpayer, as well as being inconsistent with its own statement that the statute of limitations should be the same in the Tax Court as it would be in the district court. *Id.* at 197. *Miller v. United States*, 38 F.3d 473 (9th Cir. 1994), involved a refund suit in the district court. *Miller* did hold that a two-year rule applied to all taxpayers, regardless of the forum. 38 F.3d at 476. However, as will be pointed out in greater detail in Taxpayer's brief on the merits should this Court grant certiorari, *Miller* relied in part on *Richards*, the correctness of which is the issue to be reviewed by this Court. The courts of appeals in *Richards* and *Miller*

For the four reasons (A through D) stated below, *Lundy* provides a better vehicle than *Richards* by which this Court may gain an insight into and correctly resolve the important issue of law involved in both cases:[4]

A. The *Lundy* Record is Complete While the Record in *Richards* is Meager.

In *Richards*, the Tax Court and Tenth Circuit opinions contain only the most bare-boned stipulated facts: the taxable year, the due date of the return, the date the Notice of Deficiency was issued and the date the taxpayer's return/claim for refund was filed. *See*, e.g., *Richards*, 37 F.3d at 587.

The Fourth Circuit, however, had the benefit in *Lundy* of a record which is extensive. Examining the *Lundy* record would provide this Court with useful insights into the type of circumstances under which the legal issue arises. The trial transcript and the admitted exhibits provide a good illustration of the circumstances of a typical taxpayer who knows he has overpaid his taxes but has been unable to file a timely return. The record in *Lundy* strongly supports Taxpayer's substantive claim that there has existed a longstanding administrative practice of the IRS, which represented a correct application of the statute, to grant refunds to taxpayers who file their returns within three years of the due date. One of Taxpayer's substantive arguments is that such practice has been

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also misinterpreted both the *Galuska* opinion and the statute.

[4]. While the primary consideration in determining which case should be reviewed is that the Supreme Court be as fully-informed as possible, Taxpayer, of course, also has a vital interest in the outcome. If review is granted in both cases but *Lundy* is stayed pending resolution of *Richards*, then Taxpayer's favorable result in the Fourth Circuit is at risk and whether he ever obtains a refund of the overpayment of his 1987 taxes would be dependent on the efforts of Ms. Richards' counsel and the record in that case. Taxpayer respectfully requests that this Court allow counsel who persuaded the Fourth Circuit, on the basis of the record in *Lundy* that he is entitled to a refund of the overpayment of his 1987 taxes, to defend that judgment.

incorporated into law under the legislative reenactment rule. Appellant's Brief at 28, *Lundy* 45 F.3d 856.

The record shows that an IRS appeals officer treated the limitation period as being three years, that the District Counsel treated the period as being three years, and that the IRS sent Taxpayer a letter telling him that the check was in the mail a year after the case was filed in the Tax Court. *Lundy* 45 F.3d at 857. These facts were not before the Tenth Circuit in *Richards*

The IRS' statement of facts in its petition contains a very troubling statement: "Upon review of the information contained in the respondent's untimely return, the Commissioner filed an amended answer [raising the limitations defense.]" Petitioner's petition for writ at 4, *Lundy*. If the Commissioner truly believed that she (and not the mere passage of time) barred Taxpayer's claim for refund when she mailed him a Notice of Deficiency and thereafter he responded by filing a petition in the Tax Court, why did she waste her valuable time reviewing the information on the return? If she truly considered the claim barred by the statute of limitations, the content of the return would be irrelevant. This is a question that cannot be asked of the IRS in *Richards*.

The IRS suggestion in the quoted language is that the IRS could not have raised the limitations defense at the time the original answer was filed because the Commissioner had not yet reviewed the taxpayer's return. Surely, this Court would want to ask the IRS how the need to review the information contained in a return is consistent with its contention that once Taxpayer unwittingly responded to the Notice of Deficiency by filing a petition in the Tax Court, his claim for refund was barred by the statute of limitations. The record in *Richards* will not support this line of inquiry.

If the Commissioner really believed that she could bar the taxpayer from obtaining his refund simply by mailing him a Notice of Deficiency, why did she program her computers to issue checks to taxpayers who claimed refunds on returns filed more than two years but less than three years from the due date of their returns?

Again, this is not a question that this Court may ask the IRS on the record of the *Richards* case.

The Commissioner's belated amendment to her Answer was not made until March 1992, more than a year after issue was joined. Included in the *Lundy* appendix was an article in the *Washington Post* based on an interview with the Commissioner which took place a few months later. Her remarks, as reported, included a statement that taxpayers who have not filed their returns had better get them in within three years, so they could collect their refunds. There is no indication that the Tenth Circuit ever considered the import of the IRS communications to the public through the media regarding the statute of limitations. The Fourth Circuit specifically referred to the fact that IRS publications distributed to the public did not warn[5] taxpayers of its contention that the three-year period for claiming refunds was shortened for taxpayers who receive a Notice of Deficiency before filing a return and then filed a petition in the Tax Court. *Lundy* 45 F.3d at 865. The Fourth Circuit also determined that the IRS did in fact change its practice regarding the statute of limitations in 1991 or 1992. *Id.* at 864-65.

The Fourth Circuit should not be reversed without requiring the IRS to respond to the questions suggested by the record in *Lundy* and to the arguments made to that Court. *Lundy* is the very case which has created the direct conflict between the circuits.

B. The Court of Appeals in *Lundy* was Presented with More Substantial Arguments on the Merits.

Taxpayer in *Lundy* raised several important arguments and policy considerations that were apparently not advanced by the taxpayer in *Richards*. These are the arguments that convinced the Fourth

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[5]. Taxpayer has contended throughout this litigation that the failure to warn taxpayers of the draconian consequences of responding to the invitation contained in the Notice of Deficiency by filing a petition in the Tax Court constitutes a trap. The victims of this trap are almost always average taxpayers who are stunned by the "box car" figures in the Notice of Deficiency asserted to be owed and believe that they have no alternative to filing a petition in the Tax Court.

Circuit to disagree with the Tenth Circuit's decision in *Richards*. Other persuasive arguments were made by Taxpayer that were not specifically discussed in the *Lundy* opinion. This Court might find these arguments persuasive but they cannot be advanced by Ms. Richards.

Some of the arguments and analysis advanced by Taxpayer in *Lundy* which were not addressed by the Tenth Circuit in *Richards* include:

(a) The IRS' position is dependent on finding a "deemed claim" concept not expressly stated in the statute. Taxpayer pointed out to the Court of Appeals that the word 'deemed'" appeared in over 300 Code provisions, including the sections that directly precede and follow section 6512 but not in section 6512 itself. Appellant's Brief at 16, *Lundy* 45 F.3d 856.

The Fourth Circuit agreed that Congress did not inadvertently fail to use the word "deemed" or "consider" in section 6512:[6] "One problem with the Tax Court's reading of § 6512(b)(3)(B) is that the language of the statute does not include the word "deemed." *Lundy* 45 F.3d at 860. Further, "[i]f Congress had intended that a claim for refund filed in the Tax Court shall be deemed to have been filed on the date of the mailing of the notice of deficiency, Congress would have said so explicitly." Id.

(b) There has existed a longstanding administrative practice of the IRS to grant refunds to all taxpayers who file their returns within three years of the due date and, in accordance with the principles enunciated in *Fribourg Navigation Co. v. Commissioner*, 383 U.S. 272, 281-84 (1966), this practice was incorporated into law when Congress, aware of this practice, reenacted the Code. Appellant's Brief at 24-28, *Lundy* 45 F.3d 856.

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[6]. The Code employs "deemed" interchangeably with "considered" which also appears in over 300 Code provisions. Taxpayer notes with bemusement that the IRS has repackaged its old wine in a new bottle. The "deemed claim" has been recharacterized in proceedings before this Court as an "imputed claim." Respondent's Brief at 5-7, *Richards* (No. 94-1537)

(c) The Tax Court failed to construe section 6512(b)(3)(B) in the context of the statutory framework of which it is a part, including section 6512(a) which prohibits a taxpayer who has filed a petition in the Tax Court from filing a refund suit in a United States district court or the Claims Court. Appellant's Brief at 6-9, *Lundy* 45 F.3d 856.

(d) The legislative history indicates that the period in which taxpayers can claim refunds was intended to be symmetrical with the period of time in which the IRS can assess a deficiency: they each have three years. Appellant's Brief at 20-24, *Lundy* 45 F.3d 856.

(e) Under the IRS interpretation, there are potentially 365 statutes of limitations for claiming refunds applied in a manner that is arbitrary, fortuitous and capricious and which bears no rational relationship between the culpability of the taxpayer and the preservation or loss of his or her refund. Appellant's Reply Brief at 16-18, *Lundy* 45 F.3d 856.

(f) *Lundy* set forth an analysis of section 322 of the 1939 Code, predecessor to current sections 6511 and 6512 in issue here. Appellant's Brief at 22-23, *Lundy* 45 F.3d 856; Appellant's Reply Brief at 4-9, *Lundy* 45 F.3d 856. The Fourth Circuit correctly concluded that section 322 of the 1939 Code, predecessor to sections 6511 and 6512, at issue here, was clear in providing a three-year statute of limitations for claiming refunds for all taxpayers. *Lundy* 45 F.3d at 862-63. Further, the legislative history accompanying the 1954 Code made clear that while some changes in language (and the redesignation of section numbers) were made, no substantive changes were intended. *Id.* at 863.

(g) *Lundy* set forth an analysis of the legislative history of the creation of the Tax Court and the extension of refund jurisdiction to that Court. Appellant's Brief at 34, *Lundy* 45 F.3d 856.

(h) Any "deemed claim" should be considered to be in the form of a federal income tax return as required by Treas. Reg. § 301.6402-3(a)(1). Appellant's Brief at 16-18, *Lundy* 45 F.3d 856.

(1) Taxpayer's actual return/claim for refund should supersede any "deemed claim." Appellant's Brief at 18-20, *Lundy* 45 F.3d 856.

These arguments can best be presented and refined by Taxpayer who developed them in the Court of Appeals.

C. *Lundy* can Provide this Court with Thorough Insight into Applicable Principles of Tax Law.

Counsel for Taxpayer are serving *pro bono publico* and therefore, are not subject to the economic constraints which would inhibit a thorough and vigorous representation of Taxpayer's position. The absence of such vigorous advocacy in the past is responsible for the line of Tax Court and courts of appeals decisions which have erroneously accepted the "deemed claim" notion and shortened the statute of limitations.

For fifty years, it has been hornbook law that a taxpayer, who overpays his taxes for a year in which he did not file a tax return, has three years from the due date of that return to file a return on which a refund is claimed. In interviews, press releases, and IRS publications, including a revenue ruling, Rev. Rul. 76-511, 1976-2 C.B. 428, Commissioners of the Internal Revenue have reiterated this proposition.

A few years ago, the IRS disturbed this sleepy little procedural statute by persuading the Tax Court that a late filer has only two years in which to redeem an overpayment by filing a tax return claiming a refund. Even more recently, the IRS has been able to extend its tortured logic to a United States district court. *Miller v. United States*, No. C92-579C, 1992 U.S. Dist. LEXIS 18979 (W.D. Wash. Dec. 1, 1992), *aff'd*, 38 F.3d 473 (9th Cir. 1994). On appeal, the IRS, in its brief to the Ninth Circuit, confessed error but the Court of Appeals affirmed anyway. *Id.* Despite its confession of error to the Ninth Circuit, the IRS now relies on *Miller* in its Petition in *Lundy* at 6-8.

How has the IRS been able to persuade the Tax Court and several courts of appeals to take this erroneous and unfair position? The

IRS obtained a foothold in *pro se* cases. The current spate of cases can be directly traced to two Tax Court cases where the court was deprived of the benefit of vigorous advocacy on behalf of the taxpayer. *Berry v. Commissioner*, 97 T.C. 339 (1991); *Galuska v. Commissioner*, 98 T.C. 661 (1991). The taxpayers in those cases did not file their returns within three years of the due date. This dictum, however, was then applied to taxpayers who had filed their returns within three years of the due date. In those cases, involving relatively small amounts of money, the taxpayers could not afford to pay counsel to fully develop a record, and economics forced counsel to limit the arguments being made.

Mr. Lundy has been represented *pro bono publico* by a tax professor, with the full support and encouragement of his law school, who has been teaching tax law for 20 years, and by an attorney who previously litigated cases for the United States Justice Department for ten years and who also drafted tax laws for three years as a member of the staff of the House Ways and Means Committee. If *Lundy* is selected for briefing and argument, their continued efforts would help to ensure that this Court will have all arguments on behalf of Taxpayer fully focused and presented. Their participation would also help level the playing field for the average taxpayer, offsetting somewhat the significant advantage the IRS enjoys because of the resources it commands.

D. The IRS Interest in having *Lundy* Stayed is Inconsistent with the Supreme Court's Interest in Reaching the Correct Decision.

Finally, it is disingenuous of the IRS to suggest to this Court that *Richards* be selected for review and *Lundy* be stayed because of an impartial application of some unexpressed first-in first-out principle.[7]

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[7]. It should also be noted that although the Court of Appeals decision in *Lundy* preceded the filing of the petition for certiorari in *Richards*, the IRS' petition for certiorari in *Lundy* was delayed until the last moment. The IRS' delay in filing its petition in *Lundy* occurred even though it intended all along to file (Respondent's Brief at 7 n.4, *Richards* (No. 94-1537)) and even though the petition contains nothing more than the text of the statutory provisions in issue, the opinions below

The primary goal of all concerned should be to assist this Court to make the correct decision. That goal will most certainly be achieved if the Court is as fully-informed as possible about the facts and the law. The selection of cases for argument should be made on this basis, not on the happenstance of first filing.

The IRS selection of *Richards* over *Lundy* for review reflects the interests of the advocate: it furthers its goal of winning. However, the IRS' quest for victory can be inconsistent with the Court's interest in arriving at a fully-informed decision if, as here, the IRS argues that the more developed case be excluded from consideration because it was not the first filed.

CONCLUSION

Taxpayer contends that the decision of the Fourth Circuit was correct and that he is entitled to a refund of the overpayment of his 1987 taxes. However, Taxpayer acknowledges that there is a direct conflict between the courts of appeals and that the issue involved is both important and recurring. If this court should grant certiorari in *Richards* and *Lundy*, *Lundy* should be briefed and argued.

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and a request to stay *Lundy* pending the resolution of *Richards* This delay could have the effect of precluding consideration of *Lundy* which is the more developed case.

Counsel for Taxpayer also notes that counsel for taxpayer in *Richards* stated that he was personally advised of the Fourth Circuit's decision in *Lundy* by the attorney who represented the IRS in *Richards* and *Lundy* This courtesy call would have occurred at a time when counsel for Ms. Richards and counsel for the IRS no longer had any official business to discuss in connection with the *Richards* case.

The IRS' delay in filing its petition in *Lundy* also forced Taxpayer to file this Brief in response to the IRS petition in far less time than that permitted under the rules in order to protect his interests. Had he not done so, this Court would have discussed *Richards* in conference without considering the importance of *Lundy* as a better vehicle for correctly resolving the conflict between the circuits.

(3)

No. 94-1785

In the Supreme Court of the United States

OCTOBER TERM, 1995

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ROBERT F. LUNDY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether 26 U.S.C. 6512(b)(3)(B) bars a taxpayer from obtaining a refund of an overpayment of income taxes in a Tax Court case when he (i) failed to file a return for more than two years after the return was due and the taxes in issue were paid and (ii) then filed his return only after the Commissioner issued the notice of deficiency that led to the Tax Court litigation.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 45 F.3d 856. The opinion of the Tax Court (Pet. App. 30a-52a) is reported at 65 T.C.M. (CCH) 3011.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1995. The petition for a writ of certiorari was filed on April 28, 1995, and was granted on May 30, 1995 (115 S. Ct. 2244). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 6511 (26 U.S.C.) provides, in relevant part:

(a) Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. * * *

* * * * *

(b)(2)(A) If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return. * * *

* * * * *

(b)(2)(B) If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.

* * * * *

2. Section 6512 (26 U.S.C.) provides, in relevant part:

(b)(1) Except as provided by paragraph (3) and by section 7463, if the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of income tax for the same taxable year, * * * the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Tax Court has

become final, be credited or refunded to the taxpayer.

* * * * *

(b)(3) No such credit or refund shall be allowed or made of any portion of the tax unless the Tax Court determines as part of its decision that such portion was paid—

* * * * *

(B) within the period which would be applicable under section 6511(b)(2), (c), or (d), if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating the grounds upon which the Tax Court finds that there is an overpayment * * *.

3. Section 6513 (26 U.S.C.) provides, in relevant part:

(b)(1) Any tax actually deducted and withheld at the source during any calendar year under chapter 24 shall, in respect of the recipient of the income, be deemed to have been paid by him on the 15th day of the fourth month following the close of his taxable year with respect to which such tax is allowable as a credit under section 31.

STATEMENT

1. Although federal income taxes were withheld from respondent's wages during 1987, he failed to file an income tax return for that year when it was due, on April 15, 1988. More than two years later, on September 26, 1990, in the absence of any return from respondent, the Commissioner of Internal Revenue mailed respondent a notice of deficiency of $13,806 in his income taxes for 1987. Three months later, on December 22, 1990, respondent mailed a joint income tax return for 1987 with his wife. That untimely return asserted a $3,537 overpayment of

their joint income tax liability for 1987 (Pet. App. 2a).

2. a. On December 28, 1990, respondent sought a redetermination in the Tax Court of the deficiency asserted by the Commissioner in his 1987 income taxes. Respondent also sought a further determination that he had overpaid his 1987 taxes by $3,537. Upon review of the information contained in respondent's untimely return, the Commissioner filed an amended answer that acknowledged that a deficiency did not exist in respondent's 1987 taxes and that respondent had, in fact, made an overpayment of $3,537 in the taxes that he owed for that year (Pet. App. 2a).

Following these stipulations, the only issue remaining in the Tax Court was whether respondent was entitled to a refund of the overpayment. The Commissioner contended that a refund of the overpayment was barred by the provisions of Sections 6511 and 6512 of the Internal Revenue Code, 26 U.S.C. 6511, 6512 (Pet. App. 3a).

b. The Tax Court agreed with the Commissioner that Sections 6511 and 6512 bar any recovery of respondent's refund claim (Pet. App. 30a-52a). The court noted that Section 6512(b)(3)(B) limits the amount of any overpayment that may be refunded in a Tax Court case to the amount that would have been refundable under Section 6511(b)(2) if a claim for refund had been filed "on the date of the mailing of the notice of deficiency" (Pet. App. 37a-38a, quoting 26 U.S.C. 6512(b)(3)(B)). The court stated that Section 6512(b)(3)(B) "directs us to focus on the situation as it would have been on a specified date—the date of the mailing of the notice of deficiency. Thus, this provision requires us to 'take a snapshot' of the situation" as of the date of the mailing of the notice of deficiency (Pet. App. 38a). Because, as of the date the notice of deficiency was mailed, respondent had not filed a return for his 1987 taxes, the amount of the overpayment of tax that was refundable to him was limited to the amount of tax he had paid within the two-year period immediately preceding the date that the notice of deficiency was mailed (*id.* at 39a, citing 26 U.S.C. 6511(b)(2)(B)). Since respondent had not paid any of the taxes involved in this case during the two-year period preceding the mailing of the notice of deficiency, the court concluded that Section 6512(b)(3)(B) bars any refund of respondent's overpayment (Pet. App. 39).

The Tax Court rejected (Pet. App. 51a) respondent's contention that the government should be estopped from applying the two-year limitation of Section 6512(b)(3)(B):[1]

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[1] The Tax Court made the following findings concerning the late filing of respondent's 1987 tax return (Pet. App. 32a-33a):

> [The taxpayer] timely requested an automatic extension of time to file his tax return for 1987; the filing period was extended to August 15, 1988. From 1988 through 1990, [the taxpayer] had health problems, was hospitalized after a car accident, dealt with various family problems, and was involved in a divorce. On June 4, 1990, [the government] sent a letter to [the taxpayer] stating that if the [government] did not hear from [the taxpayer] within 30 days, then [the government] would prepare a substitute return for 1987 for [the taxpayer]. In response, on July 3, 1990, [the taxpayer] wrote to [the government] stating that he had not yet filed his 1987 income tax return, but that he would "file within the three year period to claim [his] refund". From June 1988 until September 1990, [the government] contacted [the taxpayer] twice about his 1987 Federal income tax

> [Respondent] contends that he was misled by [the government] because he relied on * * * representations that a taxpayer has 3 years from the time the tax was paid to file a return or claim for credit or refund. [Respondent] does not claim that any specific type of estoppel should be applied to [the government]. However, his contentions are similar to the equitable estoppel argument which was rejected in *Dillard* v. *Commissioner*, T.C. Memo. 1992-126, and we also reject it in the instant case. * * * [Respondent] testified that [the government's] employees urged him to file his 1987 tax return as soon as possible. As noted in Rev. Rul. 57-354, [1957-2 C.B. 913], which [respondent] relies on for his administrative practice argument, for at least a generation [the government] has warned that if a taxpayer files a claim for credit or refund before filing a tax return for that period, then the taxpayer may lose an opportunity to get the credit or refund.

Noting that the limitation on refunds of overpayments in Tax Court that this case involves "is specifically provided by statute," the court concluded that "[t]here is no basis for an estoppel against [the Commissioner] in the instant case. See *Miller* v. *United States*, 949 F.2d 708, 712-713 (4th Cir. 1991)." Pet. App. 51a.

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return. Each time [the government] asked [the taxpayer] to file his tax return "as soon as possible.". On these occasions, [the government] did not tell [the taxpayer] that he did not have to file his 1987 tax return for 3 years.

The court stated that "the statute is intricate and precise" in denying a refund in the context of this case (Pet. App. 51a). The court concluded that, even if the statute may appear harsh to a person such as respondent who failed to file his return in a timely manner, the statute must be applied "as the Congress enacted it" (*id.* at 51a-52a).

3. The court of appeals reversed (Pet. App. 1a-29a). In doing so, the court rejected the decisions of several other circuits that had upheld the Tax Court's analysis of these statutory provisions (*id.* at 21a-22a, citing, *e.g.*, *Richards* v. *Commissioner*, 37 F.3d 587 (10th Cir. 1994), petition for cert. pending, No. 94-1537).[2] The court of appeals held in the present case (Pet. App. 12a) that, notwithstanding the plain language of the statute, Section 6512(b)(3)(B) does not require the Tax Court to test the taxpayer's claim for refund as if it were filed on the date that the notice of deficiency was issued. In reaching that conclusion, the court of appeals relied on what it regarded as evidence in "the legislative history of

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[2] See, *e.g.*, *Davison* v. *Commissioner*, 9 F.3d 1538 (2d Cir. 1993) (Table) (unpub.), aff'g 64 T.C.M. (CCH) 1517 (1992); *Allen* v. *Commissioner*, 23 F.3d 406 (6th Cir. 1994) (Table) (unpub.), aff'g 99 T.C. 475 (1992); *Galuska* v. *Commissioner*, 5 F.3d 195 (7th Cir. 1993). The court of appeals also expressly disagreed (Pet. App. 22a, 25a-28a) with the Ninth Circuit's analysis of Section 6511 in *Miller* v. *United States*, 38 F.3d 473 (1994). The analysis of the Ninth Circuit in *Miller* led directly to that court's decision in *Rossman* v. *Commissioner*, 46 F.3d 1144 (1995) (Table) (unpub.), aff'g 66 T.C.M. (CCH) 336 (1993), petition for cert. pending, No. 94-1747, which held that Section 6512(b)(3)(B) barred a refund of the overpayment made by the taxpayer in that case. The decision in *Rossman* also directly conflicts with the decision of the court of appeals in the present case.

§ 6512 [that] indicates that Congress intended a taxpayer who filed a claim for refund within three years of filing a tax return to have a three-year refund period that runs from the date of the mailing of the notice of deficiency" (Pet. App. 17a). Based on this reading of the legislative history, the court stated (*ibid.*):

> We interpret § 6512(b)(3)(B) to provide for a three-year refund period where the taxpayer files a claim for refund in Tax Court within three years of filing his tax return and to commence the refund period from the date of the mailing of the notice of deficiency.

The court of appeals also sought to rely on what it perceived to be the potential anomaly that respondent "would have received his refund if he had filed his claim for refund in a United States district court or the United States Claims Court" (Pet. App. 10a). In making this assertion, the court assumed that a return filed by a taxpayer more than two years after the return was due would permit a subsequent refund claim to invoke the three-year refund period of Section 6511(b)(2)(A). The court recognized (Pet. App. 27a) that its assumption that the same taxpayer would fare differently in a refund suit in the Court of Federal Claims or in federal district court than in the Tax Court had been squarely rejected by the Ninth Circuit in *Miller* v. *United States*, 38 F.3d 473, 475-476 (1994). In *Miller*, the court ruled that, when a return is not filed within "two years after payment," the taxpayer's claim—whether brought in the Court of Federal Claims, federal district court or in the Tax Court—is barred by Section 6511(a). 38 F.3d at 476. The court explained in *Miller* that an

untimely return filed more than two years after the date of payment "cannot resurrect the three-year period" (*id.* at 475):

> If the clock were to run only from the filing of the return, no claim would ever be barred as long as the return was not filed. * * * The point at which one must determine whether a return has or has not been filed, for purposes of [Section 6511(a)], must be two years after payment. Otherwise, no claim could ever finally be barred by the two-year-after-payment clause because the taxpayer could at any time file a return and have three more years to assert the claim.

In the present case, however, the court of appeals expressly disagreed with the reasoning of *Miller*. The court concluded instead that, "under § 6511(a), [a taxpayer] has three years from the date of the filing of even a delinquent tax return to file a claim for refund" (Pet. App. 27a). The court did not attempt to explain what, if any, role it would attribute to the two-year limit on refunds under Section 6511(a) that was central to the court's decision in *Miller*.

The court of appeals summarized its holding in the present case as follows (Pet. App. 12a):

> We hold that the Tax Court when applying the limitation provision of § 6511(b)(2) in light of § 6512(b)(3)(B), should substitute the date of the mailing of the notice of deficiency for the date on which the taxpayer filed the claim for refund, but only for the purpose of determining the benchmark date for measuring the limitation period and not for the purpose of determining whether the two-year or three-year limitation period applies. In other words, we interpret § 6512(b)(3)(B) as merely shifting back the

> benchmark date of the refund period from the date on which the taxpayer filed the claim for refund to the date on which the IRS mailed the notice of deficiency; § 6512(b)(3)(B) does not change the length of the refund period from what would have been applied under § 6511(b)(2).

Because the entire amount of the overpayment involved in this case had been made within three years of the mailing date of the notice of deficiency, the court concluded that respondent was entitled to a refund of the overpayment under Section 6512(b)(3)(B) (Pet. App. 13a).

SUMMARY OF ARGUMENT

1. When a taxpayer petitions the Tax Court for review of a deficiency asserted by the Commissioner, Section 6512(b)(1) of the Internal Revenue Code authorizes the Tax Court not only to review the claimed deficiency but also to determine the amount of any overpayment that the taxpayer may have made. 26 U.S.C. 6512(b)(1). Section 6512(b)(3)(B), however, limits the amount of any refund of an overpayment determined by the Tax Court to the amount that would have been refundable under Section 6511(b)(2) if a claim for refund had been filed by the taxpayer "on the date of the mailing of the notice of deficiency" (26 U.S.C. 6512(b)(3)(B)).

Section 6511(b)(2)—which Section 6512(b)(3)(B) incorporates by reference—limits the amount of any refund to the amount of the disputed taxes that the taxpayer paid (i) within the two-year period prior to the date of the refund claim if, at the time of the refund claim, "no return was filed by the taxpayer" (26 U.S.C. 6511(a), incorporated by reference in 26 U.S.C. 6511(b)(2)(B)) or (ii) within the three-year period prior to the date of the refund claim if the refund claim was made "within 3 years from the time the return was filed" (26 U.S.C. 6511(a), incorporated by reference in 26 U.S.C. 6511(b)(2)(A)). Section 6512(b)(3)(B) incorporates these refund limitations into Tax Court overpayment determinations and specifies that they are to be applied by assuming that a claim for refund was filed by the taxpayer "on the date of the mailing of the notice of deficiency" (26 U.S.C. 6512(b)(3)(B)).

In the present case, respondent had failed to file any return for 1987 by the time the notice of deficiency was mailed by the Commissioner in 1990. Accordingly, on the date that the notice of deficiency was issued and the statutorily imputed refund claim arose under Section 6512(b)(3)(B), "no return was filed by the taxpayer" (26 U.S.C. 6511(a)). As the result, the refund that respondent may obtain for his overpayment of tax for 1987 is limited to the amount of tax that he paid during the two-year period immediately preceding the imputed refund claim. 26 U.S.C. 6511(b)(2)(B). Because no portion of the tax at issue in this case was paid within the two-year period preceding the mailing of the notice of deficiency, respondent was barred by the statutory text from obtaining any refund of his overpayment, as the Tax Court correctly held.

2. The court of appeals expressly disregarded the plain language of Section 6512(b)(3)(B) in order to achieve a result that the court concluded was supported by its legislative history. In the court's view, the history of the statute supports the proposition that Congress intended a taxpayer who challenges a

tax in Tax Court to be able to obtain a refund for the amount of any overpayment made within three years of the date that the notice of deficiency was mailed.

The extraordinarily sparse history cited by the court of appeals falls far short of supporting the court's speculations concerning legislative intent and, in any event, does not provide a basis for flouting the direct command of the plain language of Section 6512(b)(3)(B). By disregarding the text of the statute, the court of appeals reached a conclusion that conflicts with a prior decision of that court and also with decisions of the Second, Sixth, Seventh, Ninth and Tenth Circuits.

3. The court of appeals found additional support for its decision in the potential anomaly that respondent may not have been barred from recovery if he had elected to bring suit for a refund in federal district court instead of challenging the tax in the Tax Court. But Congress has provided numerous distinctions between district court actions and Tax Court proceedings. Even if the court of appeals were correct in assuming that respondent would have fared better had he elected to proceed in district court, that would not provide a valid basis for ignoring the plain language of Section 6512(b)(3)(B). Moreover, as the Ninth Circuit explained in *Miller* v. *United States*, *supra*, the text of the statute supports a conclusion that the presumed anomaly may not exist—that a taxpayer such as respondent who fails to file a return for more than two years after it is due may also be ineligible to receive a refund of his overpayment in a suit brought in district court.

ARGUMENT

SECTION 6512(b)(3)(B) OF THE INTERNAL REVENUE CODE BARS A TAXPAYER FROM OBTAINING A REFUND OF AN OVERPAYMENT OF INCOME TAXES IN A TAX COURT CASE WHEN THE TAXPAYER (i) FAILED TO FILE A RETURN FOR MORE THAN TWO YEARS AFTER THE RETURN WAS DUE AND THE TAXES IN ISSUE WERE PAID AND (ii) THEN FILED HIS RETURN ONLY AFTER THE COMMISSIONER ISSUED THE NOTICE OF DEFICIENCY THAT LED TO THE TAX COURT LITIGATION

The Tax Court is a court of limited jurisdiction. *Commissioner* v. *McCoy*, 484 U.S. 3, 7 (1987); *Commissioner* v. *Gooch Milling & Elevator Co.*, 320 U.S. 418, 420 (1943). This case concerns the limits on the jurisdiction of the Tax Court to award refunds for overpayments of tax.

1. *The Governing Statutory Provisions*

The statutory limits on refunds in Tax Court proceedings (in Section 6512 of the Internal Revenue Code) are derived from, but not identical to, the limits that apply to refund suits in federal district courts (in Section 6511 of the Code). A description of the latter provisions is necessary for an explanation of the former.

a. In separate, intertwined subsections of Section 6511, Congress has provided both a statute of limitations for claims for refund and a limit on the amount of a refund that may be recovered under timely filed claims. Section 6511(a) specifies that any claim for refund must be submitted to the Commissioner (26 U.S.C. 6511(a))

> within 3 years from the time the return was filed or 2 years from the time the tax was paid, which-

> ever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid.

If a refund claim is submitted out of time under this provision, it must be disallowed. 26 U.S.C. 6511(b)(1).

If a refund claim has been submitted within the time permitted by Section 6511(a), Section 6511 (b)(2) then provides limits on the *amount* of any refund that may be allowed. The subparagraphs of Section 6511(b)(2) are sometimes referred to as the "look-back" rules. See, *e.g.*, *Allen* v. *Commissioner*, 99 T.C. 475, 477 (1992), aff'd, 23 F.3d 406 (6th Cir. 1994) (Table) (unpub.). They limit the amount of any refund of an overpayment of tax to the amount of the taxes that the taxpayer paid

> (i) within the *three-year period* prior to the date of the refund claim if the refund claim was made "within 3 years from the time the return was filed" (26 U.S.C. 6511(a), incorporated by reference in 26 U.S.C. 6511(b)(2)(A)); or
>
> (ii) within the *two-year period* prior to the date of the refund claim if, (I) at the time of the refund claim, "no return was filed by the taxpayer" or (II) the refund claim was filed more than three years after the return but within two years "from the time the tax was paid" (26 U.S.C. 6511(a), incorporated by reference in 26 U.S.C. 6511(b)(2)(B)).

See *Richards* v. *Commissioner*, 37 F.3d 587, 589 (10th Cir. 1994); *Galuska* v. *Commissioner*, 5 F.3d 195, 196 (7th Cir. 1993).

b. The provisions of Section 6511 are not, by their terms, directly applicable to Tax Court proceedings.

Indeed, the jurisdiction of the Tax Court may not be invoked solely for the purpose of obtaining a refund. Instead, the basic jurisdiction of the Tax Court is to review deficiencies in tax that the Commissioner has asserted.[3] 26 U.S.C. 6213(a). In proceedings commenced by a taxpayer to review an asserted deficiency, however, the Tax Court has been given jurisdiction not only to redetermine the amount of the deficiency but also to determine the amount of any overpayment that the taxpayer may have made. 26 U.S.C. 6512(b)(1). An overpayment determined by the Tax Court in such a proceeding is to be credited or refunded to the taxpayer subject to the express limitations of Section 6512(b)(3) of the Code. See 26 U.S.C. 6512(b)(1).[4]

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[3] A "deficiency" in tax is ordinarily the amount by which the tax determined to be due by the Commissioner exceeds the amount reported by the taxpayer on the return. 26 U.S.C. 6211(a)(1). When the Commissioner determines a "deficiency" because the taxpayer has filed no return or has underreported the taxes due on his return, the Commissioner may not proceed to assessment and collection of the outstanding tax until notice of the deficiency is issued to the taxpayer. 26 U.S.C. 6212(a). If, within 90 days after issuance of the notice of deficiency, the taxpayer files a petition for review of the deficiency in Tax Court, the Commissioner may not proceed to assessment and collection until the judgment of the Tax Court becomes final. 26 U.S.C. 6213(a). During the period of the Tax Court litigation (and for 60 days thereafter), the three-year statute of limitations on assessment (that commences upon the filing of the return) is tolled. See 26 U.S.C. 6501, 6503(a)(1).

[4] Beginning in 1928, Congress enacted a series of provisions that conferred jurisdiction on the Tax Court to determine the amount of overpayments. See, *e.g.*, Revenue Act of 1928, ch. 852, § 322, 45 Stat. 861; Revenue Act of 1936, ch. 690, § 322, 49 Stat. 1731; Revenue Act of 1942, ch. 619, § 169, 56 Stat.

Section 6512(b)(3)(B) limits the amount of any refund of an overpayment determined in a Tax Court case to the amount that would have been refundable under Section 6511(b)(2) if a claim for refund had been filed by the taxpayer "on the date of the mailing of the notice of deficiency" (26 U.S.C. 6512(b)(3)(B)).[5] Thus, under Section 6512(b)(3)(B), the refund limitations of Section 6511(b)(2) are incorpo-

876; 26 U.S.C. 6511, 6512 (Supp. II 1954). See also *Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 527-531 (1947). Even though these provisions authorized the Tax Court to determine an overpayment, the court was not initially given "power to order a refund or credit should it find that there has been an overpayment" (*Commissioner* v. *Gooch Milling & Elevator Co.*, 320 U.S. at 420). Under Section 6512(b)(2) of the Code, however, the Tax Court is now authorized "to order the refund of such overpayment and interest" if, after the decision of the Tax Court becomes final, the Secretary fails to refund the overpayment. 26 U.S.C. 6512(b)(2).

[5] Paragraph (3) of Section 6512(b) has three subparagraphs. Section 6512(b)(3)(B) is the one applicable to this case; Section 6512(b)(3)(A) does not apply because no payments were made by respondent after the notice of deficiency was mailed; Section 6512(b)(3)(C) does not apply because no claim for refund was filed by respondent before the notice of deficiency was mailed. See 26 U.S.C. 6512(b)(3)(A)-(C).

Section 6512(b)(3)(B) incorporates by reference three limitations provisions. See 26 U.S.C. 6512(b)(3)(B). Only one of those provisions (Section 6511(b)(2)) is applicable to the present case. Sections 6511(c) and (d), which are also incorporated by reference in Section 6512(b)(3)(B), are inapplicable because Section 6511(c) applies only when the time for assessing a tax has been extended by agreement and Section 6511(d) applies only to specified types of claims—such as bad debts, worthless securities, net operating losses, and certain credit carrybacks—that the present case does not involve. See 26 U.S.C. 6511(c) and (d) (1988 & Supp. V 1993).

rated into Tax Court overpayment determinations and are to be applied by assuming that a claim for refund was filed by the taxpayer "on the date of the mailing of the notice of deficiency" (26 U.S.C. 6512(b)(3)(B)). See *Galuska* v. *Commissioner*, 5 F.3d at 196; Pet. App. 38a.

2. *Application of the Statutory Provisions to This Case*

In the present case, when the notice of deficiency was issued by the Commissioner in September 1990, respondent had not filed any return for his 1987 tax year (Pet. App. 33a).[6] Thus, on the date that the notice of deficiency was issued and the statutorily imputed refund claim arose under Section 6512(b)(3)(B), "no return was filed by the taxpayer" (26 U.S.C. 6511(a)). The refund that respondent may obtain for his overpayment of tax for 1987 is therefore limited to the amount of tax that he paid during the two-year period immediately preceding the filing of the claim for refund. 26 U.S.C. 6511(b)(2)(B), incorporated by reference in 26 U.S.C. 6512(b)(3)(B).

The Seventh Circuit explained the operation of these statutory provisions in *Galuska* v. *Commissioner*, 5 F.3d at 196:

[6] Three months after the notice of deficiency was issued, respondent filed an untimely return for his 1987 tax year and sought review of the deficiency in the Tax Court in December 1990. The belated return provided a sufficient basis for the determination of respondent's correct liability and the existence of an overpayment was then conceded by the Commissioner in the Tax Court case (Pet. App. 33a). Because the existence of an overpayment was conceded, the amount of the refund to which respondent is entitled turns solely on the correct application of the refund limitations contained in Section 6512(b)(3).

Here, by virtue of Section 6512(b)(3)(B), Galuska is deemed to have filed his claim for refund on April 12, 1990, which was the date the notice of deficiency was mailed to him. At that time he had filed no tax return for 1986. Consequently, his deemed claim for refund was not filed within the 3-year period prescribed by Section 6511(a) because it states that if no return is filed, the 2-year period prescribed therein is applicable. Therefore the look-back period is the 2-year period prescribed by Section 6511(b)(2)(B). Galuska paid no portion of the tax within that period so that Section 6512(b)(3)(B) precludes any refund of his overpayment, as the Tax Court held. At least twelve other Tax Court cases are in accord, and we discovered no case that is *contra*.

The Tenth Circuit reached the same conclusion in *Richards* v. *Commissioner*, 37 F.3d at 589:

> It is undisputed that in tax court, Ms. Richards' claim was deemed filed on the date she received her notice of deficiency, October 22, 1990, although her return was filed on January 23, 1991. As a result, her claim was not filed "within 3 years *from the time* the return was filed." 26 U.S.C.A. § 6511(a) (emphasis added). The ordinary understanding of the words "from the time" implies that the taxpayer must file the return *prior to* filing the claim in order to benefit from the three-year refund period. Ms. Richards' return, however, was filed on January 23, 1991, after the date her claim was deemed filed in tax court. Therefore, she cannot avail herself of the three-year refund period under §6511(b)(2)(A), and she is necessarily limited to the two-year refund period under § 6511(b)(2)(B).

See also *Anderson* v. *Commissioner*, 74 A.F.T.R.2d ¶ 94-6222, 94-6223 (4th Cir. 1994) ("Where, as here, the taxpayer did not file a return within three years preceding the claim for a refund of tax, section 6511(b)(2)(B) provides that the applicable limit on the amount of credit or refund is the 'portion of the tax paid during the 2 years immediately preceding the filing of the claim' ");[7] *Kartrude* v. *Commissioner*,

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[7] The court of appeals attempted to reconcile its decision in this case with the prior decision of the same circuit in *Anderson* v. *Commissioner*, *supra* (Pet. App. 28a-29a). In *Anderson*, the Fourth Circuit (in an unpublished but detailed opinion) followed the statutory analysis of the Seventh Circuit in *Galuska* v. *Commissioner*, *supra*, in holding that taxpayers who had not filed a return before the notice of deficiency was issued were barred by Section 6512(b)(3)(B) from obtaining a refund in Tax Court of any portion of their overpayment paid more than two years before the notice of deficiency was issued. The Fourth Circuit panel in the present case purported to distinguish *Anderson* on the ground that the taxpayers in *Anderson* did not file their tax returns until after they had filed their Tax Court petition while respondent in the present case mailed his tax return a few days before he filed his Tax Court petition (Pet. App. 28a-29a). The court of appeals did not explain how the factual distinction it describes—which is unrelated to any of the operative statutory terms—would make a difference in applying Section 6512(b)(3)(B).

The critical fact in applying Section 6512(b)(3)(B) in both the present case and *Anderson* is that, as of the date that the notice of deficiency was mailed to the taxpayer, "no return was filed by the taxpayer" (26 U.S.C. 6511(a), incorporated by reference in 26 U.S.C. 6511(b)(2)(B), incorporated by reference in 26 U.S.C. 6512(b)(3)(B)). As the result, "the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim" (26 U.S.C. 6511(b)(2)(B)), which date is imputed by statute (in Tax Court cases) to be

925 F.2d 1379, 1385 (11th Cir. 1991); *Allen* v. *Commissioner*, 99 T.C. at 479.

The taxes that were withheld from the income earned by respondent during 1987 are deemed by statute to have been paid on April 15, 1988, the date when his tax return for that year was due. See 26 U.S.C. 6513(b)(1). None of the taxes at issue in this case were paid by respondent within the two-year period that preceded the issuance of the notice of deficiency on September 26, 1990 (the date of the statutorily imputed refund claim under Section 6512 (b)(3)(B)). Because no portion of the tax at issue in this case was paid within the two-year period preceding the mailing of the notice of deficiency, respondent was barred from obtaining any refund of his overpayment, as the Tax Court correctly held (Pet. App. 39a). Accord, *e.g.*, *Galuska* v. *Commissioner*, 5 F.3d at 196 & n.2 (citing cases); *Richards* v. *Commissioner*, 37 F.3d at 589.

3. *Limited Waivers of Sovereign Immunity Are to Be Strictly Applied in Accordance With Their Terms*

Section 6512(b) confers a limited jurisdiction on the Tax Court to award refunds and represents a limited waiver of the sovereign immunity of the United States. Statutes waiving the immunity of the United States are to be interpreted narrowly in accordance with their terms and any ambiguity is to be resolved "in favor of immunity." *United States* v. *Williams*, 115 S. Ct. 1611, 1616 (1995), citing *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 33 (1992).[8] It is exclusively the province of Congress

"the date of the mailing of the notice of deficiency" (26 U.S.C. 6512(b)(3)(B)).

[8] The United States is immune from suit without its consent. The terms of its consent define the jurisdiction and

to decide when, and under what conditions, the sovereign immunity of the United States is to be waived, and " 'this Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied.' " *Lehman* v. *Nakshian*, 453 U.S. 156, 161 (1981), quoting *Soriano* v. *United States*, 352 U.S. 270, 276 (1957).

Obviously, statutes that limit waivers of sovereign immunity may operate to deny a litigant the right to present an otherwise valid claim for recovery against the government. Recognizing that it is the "very purpose" of such statutes to "make it impossible to enforce what were otherwise perfectly valid claims" (*United States* v. *Kubric*, 444 U.S. 111, 125 (1979)), the Court has admonished that statutory limitations on recoveries against the government "must be strictly adhered to by the judiciary" (*Kavanagh* v. *Noble*, 332 U.S. 535, 539 (1947)).

Prior to the decision of the court of appeals in the present case, the courts had consistently followed this Court's admonition and "strictly adhered" to the plain language of Section 6512(b)(3)(B). These courts uniformly concluded that if "no return was filed by the taxpayer" (26 U.S.C. 6511(a)) before the notice of deficiency was issued by the Commissioner, the taxpayer may recover in a Tax Court case only that

authority of the courts. *United States* v. *Dalm*, 494 U.S. 596, 608 (1990); *United States* v. *Alabama*, 313 U.S. 274, 282 (1941). Statutes limiting suits against the United States "constitute[] a condition on the waiver of sovereign immunity" and "define the extent of the court's jurisdiction" over such an action. *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986). See also *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983).

portion of the overpayment that he paid within the two-year period preceding the notice (26 U.S.C. 6512(b)(3)(B), incorporating 26 U.S.C. 6511(b)(2)(B)). See *Galuska* v. *Commissioner*, 5 F.3d at 196 & n.2; *Richards* v. *Commissioner*, 37 F.3d at 589 & n.6. See also *Allen* v. *Commissioner*, 23 F.3d 406 (6th Cir. 1994) (Table) (unpub.); *Davison* v. *Commissioner*, 9 F.3d 1538 (2d Cir. 1993) (Table) (unpub.), aff'g 64 T.C.M. (CCH) 1517 (1992); *Anderson* v. *Commissioner*, 36 F.3d 1091 (4th Cir. 1994) (Table) (unpub.), reported at 74 A.F.T.R.2d ¶ 94-6222, aff'g 66 T.C.M. (CCH) 4 (1993).

4. *The Court of Appeals Disregarded the Plain Language of the Statute*

The court of appeals expressly rejected the consistent reasoning of these other courts. The court held instead that (Pet. App. 12a) (emphasis added)

> the Tax Court, when applying the limitation provision of § 6511(b)(2) in light of § 6512(b)(3)(B), should substitute the date of the filing of the notice of deficiency for the date on which the taxpayer filed the claim for refund, but *only* for the purpose of determining the benchmark date for measuring the limitation period and *not* for the purpose of determining whether the two-year or three-year limitation period applies.

The court identified no textual basis in the statute for this holding. Instead, the court described four objections that it had with the reasoning of the courts that had reached a contrary interpretation.

a. The court of appeals first took issue with the Tax Court's use of the phrase " 'deemed' claim for refund" (Pet. App. 9a) to describe the statutorily

imputed refund claim that arises "on the date of the mailing of the notice of deficiency" (26 U.S.C. 6512(b)(3)(B)). The Tax Court, and other courts as well, referred to the imputed refund claim under Section 6512(b)(3)(B) as a "deemed" refund claim in applying the limits set forth in Section 6511(b)(2). See, *e.g.*, *Richards* v. *Commissioner*, 37 F.3d at 589; Pet. App. 40a. The court of appeals objected to this terminology, noting that Section 6512(b)(3)(B) does not actually use the word "deemed" (Pet. App. 9a).

The objection expressed by the court of appeals to use of the term "deemed" to refer to the statutorily imputed refund claim under Section 6512(b)(3)(B) is wholly semantical. As the Tax Court explained in its opinion in this case, "section 6512(b)(3)(B) directs us to make a determination *assuming that a claim for credit or refund was filed on * * * the date the notice of deficiency was mailed*" (Pet. App. 39a) (emphasis added). Nothing in the analysis applied by the Tax Court (or any other court) turns on the court's use of the term "deemed" as a short-hand reference to the statutorily imputed refund claim under Section 6512(b)(3)(B).

In criticizing the use of that terminology in this case, the court of appeals gave no explanation of what relevance, if any, it thought its objection would have to the correct interpretation of the statute. See Pet. App. 9a-10a. In fact, it has none. See, *e.g.*, *Galuska* v. *Commissioner*, 5 F.3d at 196 ("Galuska agrees that under Section 6512(b)(3)(B) he is deemed to have filed a claim for refund of the alleged overpayment * * * when the Commissioner mailed him the notice of deficiency"); *Richards* v. *Commissioner*, 65 T.C.M. (CCH) 2137, 2138 (1993) (Section 6512(b)(3)(B) "tests the applicable limitations pe-

riod of section 6511 against a hypothetical claim for refund filed on the date the notice of deficiency was mailed"), aff'd, 37 F.3d 587 (10th Cir. 1994), petition for cert. pending, No. 94-1537.

b. Instead of squarely confronting the words of the statute, the court of appeals relied on what it perceived to be evidence in "the legislative history of § 6512 [that] indicates that Congress intended a taxpayer who filed a claim for refund within three years of filing a tax return to have a three-year refund period that runs from the date of the mailing of the notice of deficiency" (Pet. App. 17a). The extraordinarily sparse history cited by the court of appeals falls far short of supporting the court's speculations concerning legislative intent and, in any event, does not provide a basis for flouting the direct command of the plain language of Section 6512(b)(3)(B).

The sole statement of legislative history on which the court of appeals relied (Pet. App. 17a) is a single sentence contained in the voluminous House and Senate reports that were issued in connection with the enactment of the Internal Revenue Code of 1954. These reports simply state that Section 6512, as enacted at that time, contains "no material changes from existing law" (H.R. Rep. No. 1337, 83d Cong., 2d Sess. A415 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 586 (1954)).

The court of appeals recognized that "the language of § 6512 differed from the language in" the prior version of this statute, which was Section 322(d) of the 1942 Code (Pet. App. 16a). That Section had provided (Revenue Act of 1942, ch. 619, § 169(b), 56 Stat. 877-878):

> No such credit or refund shall be made of any portion of the tax unless the Board [of Tax Appeals] determines as part of its decision (1) that such portion was paid (A) within two years before the filing of the claim, the mailing of the notice of deficiency, or the execution of an agreement by both the Commissioner and the taxpayer * * * whichever is earliest, or (B) within three years before the filing of the claim, the mailing of the notice of deficiency, or the execution of the agreement, whichever is earliest, if the claim was filed, the notice of deficiency mailed, or the agreement executed within three years from the time the return was filed by the taxpayer.

Without undertaking a close analysis of the language of the 1942 provision, the court asserted that respondent would have prevailed under that statute. The court stated that "[t]he three-year refund period [under the 1942 Act] would have run from the date of the mailing of the notice of deficiency because it was earlier than the date of the filing of the claim for refund." (Pet. App. 16a). The court then reasoned that, because "no material change" was made in enacting the different language of the 1954 Code, the same result must have been "intended" by Congress under Section 6512(b)(3)(B) (Pet. App. 17a).

The reasoning of the court of appeals is faulty for several reasons. In the first place, the court erred in attempting to interpret the language of Section 6512(b)(3)(B) by ignoring the language of that statute and interpreting instead the markedly different language of a discarded provision of an outdated Code. This case concerns the language of Section 6512(b)(3)(B), not of some other provision of law. Cf. *Badaracco* v. *Commissioner*, 464 U.S. 386, 398 (1984) ("[t]he cases before us * * * concern the construction of existing statutes").

The court compounded its error by adopting an interpretation of the 1942 provision that was manifestly incorrect. The plain language of Section 322(d) of the 1942 Act provides that the three-year refund period was available in Tax Court (then the Board of Tax Appeals) only when the "earliest" of the refund claim, the notice of deficiency or an extension agreement occurred "within three years from the time the return was filed by the taxpayer" (Revenue Act of 1942, ch. 619, § 169(b), 56 Stat. 878). Accordingly, under both Section 6512(b)(3)(B) of the current Code and Section 322(d) of the 1942 Act, the three-year refund period is unavailable to the taxpayer who fails to file a return *before* the notice of deficiency is issued: "The ordinary understanding of the words 'from the time' implies that the taxpayer must file the return *prior to* filing the claim in order to benefit from the three-year refund period." *Richards* v. *Commissioner*, 37 F.3d at 589. See pages 18-19, *supra*.

The cursory statement in the 1954 committee reports—that the enactment of Section 6512 did not make any "material changes" in existing law—thus provides no support for the conclusion reached by the court of appeals in this case. The plain meaning of statutory text should not be disregarded in the absence of "clear evidence that reading the language literally would thwart the obvious purposes of the Act." *Mansell* v. *Mansell*, 490 U.S. 581, 592 (1989); accord *West Virginia Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 98-99 (1991). Nothing in the history relied on by the court of appeals suggests that the literal application of the language of Section 6512(b)(3)(B) would defeat the obvious purpose of the statute.

c. The court of appeals recognized that the interpretation of Section 6512(b)(3)(B) applied by the

Tax Court in this case has a lengthy pedigree (Pet. App. 20a & n.11, citing a total of 25 consistent Tax Court decisions). The court of appeals suggested, however, that the administrative practice has not been consistent with that interpretation. Without offering any plausible foundation for its view,[9] the court asserted (*id.* at 21a):

> [T]he IRS, until 1992, had *always* treated § 6512(b)(3)(B) as providing a three-year refund period where the taxpayer filed a tax return and a claim for refund after the IRS mailed the notice of deficiency. Only recently has the IRS interpreted § 6512(b)(3)(B) to provide only a two-year refund period in a situation like Lundy's.

The court erred in its description of the applicable administrative practice. For at least twenty years, the Internal Revenue Service—like the Tax Court and five of the courts of appeals—has consistently interpreted Section 6512(b)(3)(B) to limit Tax Court refunds in cases of this type to the amount of taxes paid within the two-year period preceding the notice of deficiency. See, *e.g.*, *Berry* v. *Commissioner*, 97

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[9] The only support that the court offered for its assertion that the IRS had only recently adopted the Tax Court's interpretation of Section 6512(b)(3)(B) was its statement that "[t]he IRS seemed ready to pay Lundy his refund prior to March 17, 1992, when the Commissioner moved to amend its answer and argued for the first time that the Tax Court did not have the authority to grant Lundy his refund" (Pet. App. 21a). Without offering any other basis for its understanding of administrative practice, the court offered the following speculation: "We suspect that the IRS's interpretation of § 6512(b)(3)(B) originated sometime in 1991 or 1992" (Pet. App. 21a).

T.C. 339, 344-345 (1991); *Hall* v. *Commissioner*, 58 T.C.M. (CCH) 879, 880 (1989); *White* v. *Commissioner*, 72 T.C. 1126, 1131 (1979) ("It is respondent's position * * * that any overpayment which may be determined * * * cannot be refunded or credited to petitioner due to restrictions contained in sections 6511 and 6512"); *Hosking* v. *Commissioner*, 62 T.C. 635, 642 (1974) ("Respondent contends that the record does not permit the finding necessary under section 6512(b)(2) to entitle petitioner to a refund."). That consistent administrative practice supports the interpretation of Section 6512(b)(3)(B) applied by the Tax Court in this case.

d. In concluding that respondent should be allowed to recover a refund of any overpayment made within the three-year period preceeding the issuance of the notice of deficiency, the court of appeals also relied on what it perceived to be the potential anomaly that "Lundy would have received his refund if he had filed his claim for refund in a United States district court or the United States Claims Court" (Pet. App. 10a). In making this assertion, the court assumed that a return filed by a taxpayer more than two years after the return was due would permit a subsequent refund claim to invoke the three-year refund period of Section 6511(b)(2)(A). That assumed result, of course, has no direct relevance to the proper interpretation of the plain language of Section 6512(b)(3)(B).[10]

[10] Whether Lundy would have received his refund if the "circumstances had been different" (Pet. App. 11a) is irrelevant to interpreting the statute as it applies to the facts of this case. See *Richards* v. *Commissioner*, 37 F.3d at 591. Where the statute's language is plain, the "sole function of the courts is to enforce it according to its terms." *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989).

Moreover, the court's assumption that the same taxpayer would fare differently in a refund suit in federal district court or the Court of Federal Claims than in the Tax Court has been squarely rejected by the Ninth Circuit in *Miller* v. *United States*, 38 F.3d 473 (1994). In *Miller*, the court held that, when a return is not filed within "two years after the payment of taxes," the taxpayer's claim for refund—whether brought in the Court of Federal Claims, federal district court or in the Tax Court—is barred by Section 6511(a).[11] See 38 F.3d at 476; see also *Rossman* v. *Commissioner*, 46 F.3d 1144 (9th Cir. 1995) (Table) (unpub.), petition for cert. pending, No. 94-1747. The court noted in *Miller* that 26 U.S.C. 6511(a) specifies that, to be timely, a refund claim must be filed (38 F.3d at 475):

> within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within two years from the time the tax was paid.

[11] Revenue Ruling 76-511, 1976-2 C.B. 428, assumes that, if (i) a return is filed more than two but less than three years after it is due and (ii) a refund claim is filed contemporaneously or subsequently, "the refund would [be] allowable since the overpayment would have been made within the 3-year period immediately preceding the filing of the claim." *Id.* at 429. That Ruling is inconsistent with the court of appeals' conclusion in *Miller*. See 38 F.3d at 475. For the reasons discussed in the text, however, the question whether *Miller* or Revenue Ruling 76-511 correctly interprets Section 6511(a) is not presented in this case and need not be resolved by the Court. See pages 31-33, *infra*.

The court concluded that an untimely return filed more than "2 years from the time the tax was paid" (26 U.S.C. 6511(a)) "cannot resurrect the three-year period" (38 F.3d at 475):

> If the clock were to run only from the filing of the return, no claim would ever be barred as long as the return was not filed. * * * The point at which one must determine whether a return has or has not been filed, for purposes of [Section 6511(a)], must be two years after payment. Otherwise, no claim could ever finally be barred by the two-year-after-payment clause because the taxpayer could at any time file a return and have three more years to assert the claim.

See also *Oropallo* v. *United States*, 994 F.2d 25, 30 (1st Cir. 1993) ("We have assumed [for the sake of argument] that a return can be filed at any time after its due date and still be a return for purposes of filing a claim within that three-year period. Under that interpretation, the limitations period in section 6511(a) is totally illusory."), cert. denied, 114 S. Ct. 705 (1994).[12]

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[12] The precise role intended for the last clause of Section 6511(a) has never been clearly stated by Congress. The phrasing of that Section first appeared in approximately its current form as Section 322(b)(1) of the Revenue Act of 1934, ch. 277, 48 Stat. 750. That Section provided (*ibid.*):

> Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

The history of the 1934 Act indicates that this Section sought to ensure that the taxpayer had no longer a period to seek a refund than was available for assessment. See S. Rep. No. 558, 73d Cong., 2d Sess. 44 (1934). That history does not indicate whether an untimely return would extend the time for filing a refund claim in situations where the tax had been paid more than two years previously.

The language of this provision was revised in 1954 and was revised again into its current form in 1958. The 1953 revision specified that the claim for refund could be filed within three years of when "the return was filed" (26 U.S.C. 6511(a) (1958)), as contrasted with the 1954 provisions under which the claim was required to be filed within three years "from the time the return was required to be filed (determined without regard to any extension)" (26 U.S.C. 6511(a) (Supp. II 1954)). As a concurrent change in the language of Section 6511(b) reflects, the purpose of the 1958 revision to Section 6511(a) was to allow the time for the filing of the *refund claim* to be expanded to include "the period of any extension for filing the return to which the claim relates" (H.R. Rep. No. 775, 85th Cong., 1st Sess. 102 (1957)). Accord S. Rep. No. 1983, 85th Cong., 2d Sess. 233-234 (1958). The histories of the 1954 and 1958 revisions do not discuss or explain the separate role intended for the last clause of Section 6511(a), which since 1934 has provided only a two-year period to file a claim for refund "if no return was filed" (26 U.S.C. 6511(a)).

Even if—notwithstanding the reasoning of *Miller* and *Oropallo*—the language of Section 6512(b)(3) produces a difference in the treatment of taxpayers who seek a refund of their overpayment in the Tax Court and those who seek their refund in a district court or the Court of Federal Claims, it is not the function of this Court "to treat alike subjects that different congresses have chosen to treat differently."

West Virginia Univ. Hosps., Inc. v. *Casey*, 499 U.S. at 101. See *Richards* v. *Commissioner*, 37 F.3d at 591. There are numerous, significant differences between litigation in the Tax Court and in a district court. For example, (i) jury trials are allowed in a district court refund suit (28 U.S.C. 2402), but not in Tax Court suits (*Coleman* v. *Commissioner*, 791 F.2d 68, 71 (7th Cir. 1986)); (ii) in the Tax Court, but generally not in district court, the Commissioner may assert a deficiency greater than that determined in the notice of deficiency (26 U.S.C. 6214(a); see *Ferrill* v. *Commissioner*, 684 F.2d 261, 265 (3d Cir. 1982));[13] and (iii) the Tax Court, unlike the district courts, "is a court of limited jurisdiction and lacks general equitable powers" (*Commissioner* v. *McCoy*, 484 U.S. at 7).[14] The potential disparity in treatment of Tax Court and district court refund litigation, on which the court of appeals relied in this case, provides no basis for dis-

[13] Because the limitations period on assessment is suspended during the pendency of a Tax Court proceeding (26 U.S.C. 6503(a)), any increased deficiency asserted by the Commissioner would not be barred by the statute of limitations. A refund suit, however, does not suspend the period of limitations on assessment and, therefore, the government generally would be barred by the statute of limitations from asserting new deficiencies in tax against the taxpayer in such a suit. See P. Junghans & J. Becker, *Federal Tax Litigation* ¶ 3.06, at 3-16 (2d ed. 1992).

[14] Additional distinctions exist. For example, the right of a husband and wife who have filed separate returns for a particular year thereafter to elect to file a joint return for that year is terminated if either files a petition in Tax Court but not if either files a refund suit in district court. See 26 U.S.C. 6013(b)(2).

regarding the direct command of the specific language that Congress has employed.

It should not be forgotten that the solution to respondent's predicament was within his own grasp. Only taxpayers who file tax returns more than two years after they are due are affected by the decision in this case.[15] A legislative determination that refunds should be restricted for such severely delinquent filers is not unduly harsh.[16]

[15] If the notice of deficiency were issued in the first two years following the date on which the return was due, the taxpayer's payments during the tax year would be within the two-year refund period (under 26 U.S.C. 6511(b)(2)(B)) even if a return had not been filed. This is because withholding taxes and estimated tax payments made during the tax year are presumed to have been made on the date that the return was due. See 26 U.S.C. 6513(b)(1) and (2). If the taxpayer filed a timely return *before* the notice of deficiency, and the notice of deficiency were filed within three years from the filing of the return, the taxpayer would be entitled to recover overpayments made within the three-year period preceding the issuance of the notice under Sction 6512(b)(3)(B). See 26 U.S.C. 6511(a), incorporated in 26 U.S.C. 6511(b)(2)(A), incorporated in 26 U.S.C. 6512(b)(3)(B). Taxpayers who file timely returns are thus protected because the notice of deficiency generally must be issued in time to permit assessment to occur "within 3 years after the return was filed" (26 U.S.C. 6501(a)). See note 3, *supra*.

[16] Moreover, this Court has repeatedly held that courts are not authorized to rewrite a statute merely because they regard its effects as harsh or its operation to be "susceptible of improvement" (*Badarraco* v. *Commissioner*, 464 U.S. 386, 398 (1984)). See, *e.g.*, *TVA* v. *Hill*, 437 U.S. 153, 194-195 (1978); *Lewyt Corp.* v. *Commissioner*, 349 U.S. 237, 240 (1955); *United States* v. *Olympic Radio & Television, Inc.*, 349 U.S. 232, 236 (1955). "Neither [this Court] nor the Commissioner may rewrite the statute simply because we may

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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feel that the scheme it creates could be improved upon." *United States* v. *Calamaro*, 354 U.S. 351, 357 (1957).

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94-1785

SUPREME COURT OF THE UNITED STATES

October Term, 1995

COMMISSIONER OF INTERNAL REVENUE, *Petitioner*

v.

ROBERT F. LUNDY, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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PETITION FOR CERTIORARI FILED APRIL 28, 1995
CERTIORARI GRANTED MAY 30, 1995

55pp

QUESTION PRESENTED

The question applies to taxpayers who petition the Tax Court under the following circumstances: (1) a taxpayer overpays, usually as a result of overwithholding, the amount of tax owed, (2) the taxpayer is delayed in filing his return, (3) the IRS mails a Notice of Deficiency to the taxpayer after two but before three years from the due date of the return, (4) the taxpayer subsequently files a tax return claiming a refund within three years of the original due date of his return and (5) the taxpayer subsequently files a petition in the Tax Court seeking a redetermination of the asserted deficiency and a refund of his overpayment.

Whether, under these circumstances, the IRS can shorten the statute of limitations on claiming a refund in the Tax Court to less than three years by mailing a Notice of Deficiency to a taxpayer more than two but less than three years from the due date of his return.

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IN THE SUPREME COURT OF THE UNITED STATES

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v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

STATEMENT OF THE CASE[1]

Federal taxes were withheld from the income of Robert F. Lundy (hereinafter "Taxpayer") for the 1987 taxable year. Like many Americans, it was Taxpayer's custom and practice to permit the petitioner (hereinafter "IRS") to overwithhold from his income so that he never owed the IRS any taxes on April 15th and was, in fact, due a refund. As a practical matter, each year, Taxpayer was making an interest free loan to the IRS. (A. 68, 82).

Taxpayer was led to believe, by the IRS officials with whom he dealt, that he had a full three years in which to file his return. Taxpayer had past experience with the IRS on this very subject. Previously he had filed returns claiming a refund near the end of the

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[1] All "A" references are to pages in the Appendix to Taxpayer's main brief in the court of appeals which included the trial court record. Appellant's Brief, App. A., *Lundy v. IRS*, 45 F.3d 856 (4th Cir. 1995) (No. 94-1260).

All "L" references in this brief are to Taxpayer's Lodging which has been lodged with the Clerk for the convenience of the Court. The included documents are cross-referenced to where they appeared in the record in the court of appeals. *See* Appellant's Addendum C, *Lundy* (No. 94-1260). A few newspaper articles from the 1995 tax filing season post-dated the proceeding below.

three-year grace period and had received his refund in full. (A. 69-70, 86).

From 1988 through 1990, Taxpayer suffered a number of personal and health problems. He was hospitalized after a car accident, dealt with various family problems, and was involved in a divorce.[2]

During the period June 1988 until September 1990, the parties conducted correspondence that is typical of correspondence between a citizen and the IRS. The IRS sent Taxpayer a form letter. Taxpayer replied with a detailed and considered response. The IRS sent still another form letter which completely ignored the correspondence of Taxpayer. (A. 75-76).

The IRS computers generated a Notice of Deficiency, (L 1), to Taxpayer on September 26, 1990. (A. 13, 52). In the Notice of Deficiency, the IRS claimed that (in addition to the $10,131.11 that had been withheld from his wages) he owed $13,806 in taxes, $2,192.55 in penalties, and interest thereon. The Notice led Taxpayer to believe that he had only two choices, either to pay the amount demanded or to file a petition in the Tax Court. (A. 77). Nowhere in the Notice did the IRS warn Taxpayer that the consequence of filing a petition in the Tax Court would be to forfeit his refund. (L 1).

Taxpayer mailed his 1987 tax return on December 22, 1990, and filed a petition in the Tax Court on December 28, 1990. (L 2). On February 15, 1991, the IRS filed its Answer. This Answer did not raise a limitations defense.

On March 12, 1991, the IRS acknowledged that it had been notified of Taxpayer's petition in the Tax Court. (A. 58). On March

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[2] The Job-like difficulties that impeded Taxpayer, (A 69-73), are not repeated in detail here. Implying negligence on the part of Taxpayer is simply diversionary. (Pet. Br. 33). Taxpayer did not become more negligent in the third year than in the second. The question before the Court is the length of the period afforded to taxpayers as a matter of legislative grace. Is it three years, as the IRS consistently tells the public, or two years, as the IRS has been urging somewhat inconsistently upon the courts?

19, 1991, the IRS sent Taxpayer a letter requesting him to gather, organize, and explain more than 150 pages of documents. (A. 55, 59-60). On May 15, 1991, the IRS sent Taxpayer a letter stating that in order to receive a refund "the Taxpayer must establish that all requirements of the law had been met." (A. 61). However, this letter did not raise a limitations defense. The only requirement which Taxpayer was asked to meet was to provide evidentiary support for the deductions that he was claiming on his 1987 return. (A. 61).

In a conference call with the Tax Court judge, counsel for the IRS indicated that it was her understanding that a settlement had been reached which involved a refund to the Taxpayer.[3] (A. 56).

On February 3, 1992, the IRS wrote the Taxpayer the following:

> Amount to be refunded to you if you owe no other obligations $3,537.
>
> You may have already received this check. If not, please allow two weeks for it to be mailed to you unless there are other matters pending which could *postpone* your refund. (emphasis added) (A. 62).

The IRS filed a Motion to Amend its Answer raising the statute of limitations defense, for the first time, on March 17, 1992 (less than five days before the call of the calendar). This motion was granted over Taxpayer's strenuous objection. (A. 88, 112.) The Taxpayer's check is still being "postponed."

A few months later the Commissioner seemed to have changed her mind. In a *Washington Post* report that appeared on October 4, 1992, then Commissioner Shirley B. Peterson said that: ". . . if you have a refund coming, you may lose it. The IRS estimates that a

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[3] During the examination of Taxpayer's return and the negotiations which followed, involving concessions on both sides. (A. 89). Taxpayer and the IRS agreed that a discrepancy of $778.00 existed between the assessment made pursuant to [Taxpayer's 1987] return of $6,954.00 and the "corrected income tax liability" of $7,372.00. The IRS admitted that income taxes were withheld from the Taxpayer in 1987 in the amount of $10,131.11. In addition, Taxpayer conceded an "addition to tax" of $369.00. (A. 13, 89-90).

third of non-filers actually have money coming to them. The law says that a refund must be claimed within three years of the date the return was due. If a refund was not claimed, the government gets to keep it." (L 6).

The Fourth Circuit was asked to take judicial notice of the fact, that whenever the IRS seeks publicity about the filing season or about its non-filer program, one of the inducements that is offered is that if a citizen is due a refund, he will receive one if he files a tax return within three years of the due date of the return from which the refund is calculated. For example, in a press release issued in March 1994, the IRS said: "In particular, the IRS urges those expecting refunds to file before it's too late. Nearly one-quarter of late filers who have sent in prior year returns received funds. Though there is no penalty for filing a refund return after the regular April 15 deadline, a refund is lost forever on a return filed more than three years late. That means refunds for 1990 must be claimed by April 15, 1994." (L 30).

Last year, in a report that ran in the *New York Times* on February 27, 1994, the present Commissioner, Margaret Milner Richardson, said: "More than one-third of the nation's non-filers are owed refunds. To claim a refund, taxpayers must file a return within three years [of the due date of the return]." (L 3).

On January 30, 1995, the Court of Appeals for the Fourth Circuit reversed the holding of the Honorable Herbert I. Chabot of the Tax Court that the Taxpayer had overpaid his 1987 income tax, but such overpayment was not refundable on the ground that the statute of limitations had run on the period in which the Tax Court could make such a determination.

The IRS has been made aware in this litigation that a serious difference exists between its communications to the public (three years to file claims for refund) and its litigation posture (two years). Yet, the publicity generated by the IRS during the 1995 tax filing season would lead a reasonable person to believe that the IRS had acquiesced in the decision of the Fourth Circuit and agreed with Taxpayer that taxpayers have three years to claim a refund. All publicity aimed at late filers suggested to them that there was a good chance that they were owed a tax refund which could be obtained if

they filed within three years of the due date of the return. (L 15-20). No one at the IRS objected to the information provided in national and regional newspapers and in the nationally syndicated cartoon *Cathy*, that late filers have three years in which to seek their refund. (L 20a).

The IRS continues to state without contradiction in the press that the period for seeking refunds of overpayments of taxes is three years. Even after the IRS filed its petition for certiorari in this case, a high-level IRS official, in publicizing its late-filer program, was quoted as saying: "[A]nyone who waits more than three years will lose [their] refund, ..." Neil MacFarquhar, *Delinquents Get to See Softer Side of IRS*, N. Y. Times, June 18, 1995, § 1, at 30. (L 8).

SUMMARY OF ARGUMENT

The last substantive change in the statute of limitations on claiming refunds in the Tax Court was made in 1942. The statute has existed in its present form since 1954. Yet, it was not until 1992 that the Tax Court, for the first time, held that a taxpayer who filed his return less than three years from the due date of the return was deprived of his refund.

The Tax Court describes the "intricate" statute that permits the IRS to confiscate the refunds of unsophisticated taxpayers as having a "plain meaning." Yet, the meaning of the statute has not been plain to the administrative agency charged with its interpretation. In a revenue ruling, in interviews with IRS officials, including Commissioners, in official publications and in press releases, the IRS has always told, and still tells, taxpayers that they have three years. (L 3-39).

The statute of limitations on claiming refunds of overpayments of taxes is found in I.R.C. § 6511.[4] It is a comprehensive statute, intended to apply in a variety of different situations. The focus of

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[4] All references to "section," "§," or "I.R.C. §" are, unless designated otherwise, references to sections of the Internal Revenue Code (1986), 26 U.S.C. § 1 et seq.

this case is on the portion of the statute that limits claims of overpayments by late-filers. Section 6511(a) contains the limitation on the time period when a late return claiming a refund of an overpayment can be filed. Section 6511(b) contains the limitation on the amount of the refund that may be allowed.

Section 6511(a) states that a timely claim for refund must be filed within three years of a tax return. In this case it has been stipulated that a return was filed. As Taxpayer's return is also his claim, Treas. Reg. § 301.6402-3(a)(5), the return and claim were filed within three years of each other because they were filed on the same date. Next, it must be determined what is the limitation on the amount that Taxpayer can recover. Since Taxpayer filed his claim within three years of the date of the return, he was entitled to a refund of the amount of the overpayment from taxes paid in the three years preceding the filing of his 1987 return. I.R.C. § 6511(b)(2)(A). His overwithholding was deemed paid on April 15, 1988. I.R.C. § 6513(a). He filed his return in December 1990. Therefore, he is entitled to a refund of the entire amount of his overpayment.

At the time the Tax Court was created in 1924, it did not have refund jurisdiction. Its jurisdiction was limited to determining deficiencies. This led to an unfortunate bifurcation of litigation because a taxpayer would have to file a petition in the Tax Court to get a proposed deficiency reduced, and then file a complaint in a district court or in the Claims Court to obtain a refund of overpaid taxes for the same taxable year.

To eliminate this bifurcation, Congress authorized the Tax Court to determine overpayments. I.R.C. § 6512(b)(1). When it granted refund jurisdiction to the Tax Court, Congress waived the prerequisite, applicable to refund suits in the district courts and the Claims Court, that an administrative claim for refund be filed with the IRS. I.R.C. § 6512(b)(3)(B). As a taxpayer might not know for many years after the IRS mailed a Notice of Deficiency that he was, in fact, due an overpayment, the filing requirement was eliminated. However, in order to prevent stale claims, Congress kept a limitation on the amount that could be refunded by incorporating the general statute of limitations by reference.

Unfortunately, current § 6512(b)(3)(B), which incorporates current § 6511, is not written very "plainly." There are four phrases to be construed in this statute: "No such credit or refund shall be allowed . . . unless . . . such portion was paid . . . [1] within the period which would be applicable under § 6511(b)(2) . . . [2] if on the date of the mailing of the notice of deficiency a claim had been filed [3] (whether or not filed) [4] stating the grounds upon which the Tax Court finds that there is an overpayment . . . ."

The phrase "(whether or not filed)" has been interpreted by the private tax bar, in learned treatises, by tax law professors, and by the Tax Court itself as meaning "could have been filed." Under that construction, a taxpayer who *could have* filed a valid claim on the date that the Notice of Deficiency was mailed by the IRS, because the three-year statute remained open, obtains the benefit of the Tax Court's refund jurisdiction. That interpretation makes sense of what Congress did. The incorporation by reference of § 6511, the general statute of limitations, makes clear that Congress did not intend that a different statute of limitations apply in the Tax Court. If it had, it would have drafted a separate provision applicable to that court only. Since a taxpayer is required to file a petition and not an administrative claim for refund, a reference date for application of the statute of limitations to Tax Court petitioners was needed. The statute of limitations is tolled on the date that the Notice of Deficiency is mailed. Taxpayer was mailed a Notice of Deficiency on September 26, 1990, well within three years of the date his taxes were paid. He is entitled to his refund.

The IRS, on the other hand, has spun a theory from the clause "if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed)," that makes nonsense of what Congress did. The construction urged by the IRS is dependent upon misconstruing the third phrase of the clause and ignoring the fourth. The IRS position is totally dependent on an acceptance of the notion that the mailing of the Notice of Deficiency by the IRS constitutes the "deemed claim" for refund filed by Taxpayer. There is no support for this contention in the statutory language. By what alchemy does the incantation of the phrase, focused on by the IRS, permit the IRS to turn its menacing form letter, (L 1), into the claim for refund filed by the taxpayer? It was not a document filed by Taxpayer. The Notice does not state " . . . the grounds upon which

the Tax Court finds there is an overpayment . . .. " Moreover, even if this "deemed claim" argument were accepted, the timely filed return/claim of Taxpayer should be treated as amending or superseding the "deemed" or "imputed" claim so that it contains the grounds required by the statute and conforms with the Treasury Regulations. While the IRS employed Taxpayer's return for purposes of determining his tax deficiency or overpayment, it treated it as a nullity for purposes of compliance with the statute of limitations.

Under the construction of the IRS, one party to a dispute, the IRS, is permitted to shorten the statute of limitations of the other party, the Taxpayer, at will. This supposed authority is exercised in a completely arbitrary and capricious manner. It can, but does not always, result in a shorter statute of limitations in the Tax Court than in the other refund forums. Even as applied to Tax Court petitioners, the result is that there is not one point in time at which the statute of limitations can be determined to have run, but 365 points in time, depending on the whim of the IRS. (L 47).

It is difficult to follow the argument of the IRS that taxpayers who file petitions in the Tax Court are negligent while those who file complaints in other courts are not. After all, the in terrorem Notice of Deficiency (L 1) mailed by the IRS invites taxpayers to contest the Notice by filing a petition in the Tax Court, but does not advise the unsophisticated taxpayer that if he accepts such invitation, his overpayment will be confiscated. What is there about the behavior of this taxpayer that permits the IRS to confiscate his refund when, had the IRS mailed its Notice of Deficiency within two years of the due date of Taxpayer's return, or had Taxpayer filed his return on September 25, 1990 (the day before the Notice of Deficiency was mailed) or had he not accepted the invitation of the IRS to file a petition in the Tax Court, he would have received a check?

The IRS has been unable to advance any policy reason that would support its construction of § 6512(b)(3)(B) which results in a shorter statute of limitations in the Tax Court than the other refund forums. Its position has been based solely on a formalistic and strained interpretation of the statute. It now urges that all late-filers, not just those that petition the Tax Court, are subject to a two-year statute of limitations. Therefore, the IRS argues that Tax Court

petitioners are in no worse position than other taxpayers. The IRS relies half-heartedly on the Ninth Circuit Court of Appeals decision in *Miller v. United States*, 38 F.3d 473 (9th Cir. 1994). That case held that late-filers who file a refund suit in a U.S. district court or in the Court of Federal Claims (hereinafter "Claims Court") must have filed their return showing an overpayment within two years of the due date in order to obtain a refund. *Miller* is patently incorrect and the IRS so recognized while that case was pending. The IRS conceded error in its brief to the Ninth Circuit, citing its own Revenue Ruling 76-511 which provides for a three-year period in which to file a late return/claim for refund. Last April it told this Court it was reconsidering this ruling but it has not announced any decision at this time. The reality is that taxpayers who file complaints in district courts, or in the Claims Court, or who ignore the Notice of Deficiency altogether, and simply await their refund checks, are getting the benefit of three years, and those who file petitions in the Tax Court get anywhere from two to three years depending on when the IRS computers burp out a Notice of Deficiency

ARGUMENT

A TAXPAYER FROM WHOSE WAGES THE IRS HAS OVERWITHHELD TAXES IS ENTITLED TO A REFUND OF HIS OVERPAYMENT IF HE FILES A LATE RETURN WITHIN THREE YEARS OF THE ORIGINAL DUE DATE OF THAT RETURN

I. The Tax Court, in Construing a Statute Which Has Been Substantially Unchanged for a Half Century, for the First Time in 1992, Denied a Refund to a Taxpayer Who Actually Filed a Refund Claim Within Three Years of the Due Date.

A brief historical perspective is necessary to place this dispute in its proper context. The last amendment of substance to the statute of limitations on claiming refunds was made in 1942. The statute has existed in its present form since 1954. Until 1992 , no taxpayer who filed a claim for refund within three years of the return's due date was denied a refund by the Tax Court.

Although two early cases suggested the possibility, the precedent for the recent explosion of cases upholding a shorter

statute of limitations for claiming refunds in the Tax Court is found in two 1991 decisions, *Berry v. Commissioner*, 97 T.C. 339 (1991) and *Galuska v. Commissioner*, 98 T.C. 661 (1991), *aff'd.* 5 F.3d 195 (7th Cir. 1993). In both cases, the taxpayer appeared *pro se* before the same Tax Court judge who was deprived of the benefit of professional advocacy. Neither of those opinions discuss any of the issues that are raised by Taxpayer in this litigation. Also, the taxpayers in those cases did not file their returns within three years of the due date. Thus, the application of the two-year limitation period to those taxpayers was dictum, as applied to taxpayers who did file their returns within three years of the due date.

The Tax Court in 1992, for the first time denied a refund to a taxpayer who actually filed a refund claim within three years of the due date. *Allen v. Commissioner*, 99 T.C. 475 (1992), *aff'd*, 23 F.2d 406 (6th Cir. 1994) (unpub.). An explosion of cases followed. (L. 47). In 1994, The Ninth Circuit Court of Appeals, despite a confession of error by the IRS, held that *all* late-filing taxpayers, not just those who have petitioned the Tax Court, are subject to a two-year statute of limitations on claiming refunds. *Miller v. United States*, 38 F.3d 473, 476 (9th Cir. 1994)..

II. A Taxpayer Does Not Have to File an Administrative Claim for Refund to Invoke the Refund Jurisdiction of the Tax Court.

Section 6402 and the regulations thereunder contain the provisions governing the filing and granting of administrative claims for refund. Section 6402 grants authority to the IRS to refund overpayments of tax. Treasury Regulation § 301.6402-2(b) provides, in pertinent part, that a refund of an overpayment may not be allowed unless a claim for refund is (1) filed with the IRS, (2) within the applicable statutory period of limitations, (3) setting forth in detail the grounds and facts upon which the claim is based, and (4) under oath. The United States district courts and the Claims Court have jurisdiction to grant refunds of overpayments of federal income tax. 28 U.S.C. § 1491 (1994); 26 U.S.C. § 7402 (1994). The filing of an administrative claim for refund is a prerequisite to the refund jurisdiction of these courts. I.R.C. § 7422(a); Treas. Reg. § 301.6402-2(a)(1). Revenue Act of 1926, Pub. L. No. 69-20, 44 Stat. 9.

When the Tax Court was created in 1924, it did not have jurisdiction to grant refunds. Congress conferred that jurisdiction upon the Tax Court in 1926 so that all issues involving a taxpayer's liability could be resolved in one proceeding.

There is no statutory provision or Treasury Regulation that requires that an administrative claim for refund be filed with the IRS as a prerequisite to the allowance of a refund to a taxpayer who has filed a petition in the Tax Court in response to a Notice of Deficiency.[5] The requirement that an administrative claim be filed prior to bringing a civil action serves the purpose of ensuring that a taxpayer first exhaust his administrative remedies prior to instituting a suit in a U.S. district court or in the Claims Court. An entirely different procedure was intended for the Tax Court. Many years were expected to elapse between the time that the IRS mails a Notice of Deficiency to a taxpayer and the time in which the Tax Court would issue an opinion. Typically, a Notice of Deficiency is sent to a taxpayer whose return was audited by the IRS and a deficiency asserted. Most taxpayers who are audited and issued a Notice of Deficiency are unaware that they had overpaid their taxes. However, when all of the facts are developed in stipulation conferences and at trial, it may be determined that the taxpayer is actually due a refund. Obviously, a taxpayer who was unaware that he had overpaid his taxes would not have filed a claim for refund.

Although no claim for refund has to be filed by the taxpayer with the IRS as a prerequisite to obtaining a refund in the Tax Court, it is still necessary to subject Tax Court petitioners to a statute of limitations. Section 6512(b)(3)(B), by incorporating § 6511, makes clear that the same statute of limitations that applies in the district court and in the Claims Court applies in the Tax Court. However, since no claim for refund need be filed in order for the Tax Court to order a refund, a reference date for compliance with the statute is

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[5] The IRS incorrectly advised the Fourth Circuit that Section 7422 applied to the Tax Court. "Section 6512(b)(3)(B), in deeming that a taxpayer has filed a claim for refund on the date the deficiency notice was mailed, regardless of whether such a claim was in fact filed *creates the legal fiction that a claim for refund has been filed under section 7422 and authorizes the Tax Court to determine an overpayment in the taxpayer's tax*, provided the overpayment is refundable under Section 6511." IRS Supplemental Brief at 3, *Lundy* (No. 94-1260) (emphasis added).

necessary. Section 6512(b)(3)(B) provides that reference date, it is the date the Notice of Deficiency is mailed.

III. Statutory Framework:

Tax Court Deficiency Jurisdiction. Section 6212 provides that "[i]f the Secretary determines that there is a deficiency in respect of any tax . . . he is authorized to send notice of such deficiency . . . by certified mail or registered mail." Section 6213(a) provides, in relevant part, that "[w]ithin 90 days . . . after the Notice of Deficiency authorized in § 6212 is mailed . . . the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency." Thus, the Tax Court acquires deficiency jurisdiction when a taxpayer responds to a Notice of Deficiency by filing a petition for redetermination of the deficiency in the Tax Court within 90 days of its issuance.

Tax Court Refund Jurisdiction. Section 6512(b)(1) provides that, once its deficiency jurisdiction is invoked, the Tax Court may find that an overpayment has been made and can order a refund. Thus, if the IRS mails a Notice of Deficiency to a taxpayer, the IRS takes a calculated risk. On occasion, rather than collecting money, the IRS will be ordered to pay a refund.

Limitation on Tax Court Refund Jurisdiction. Section 6512(b)(3)(B) incorporates by reference the limitation of § 6511(b)(2) on the amount of refund that may be recovered, making that provision expressly applicable to taxpayers in the Tax Court.

Statute of Limitations for Claiming Refunds. Section 6511, incorporated by reference into § 6512(b)(3)(B), prescribes the general statute of limitations applicable to claims for refund regardless of the forum in which a taxpayer chooses to present his claim.

IV. By Filing His Return on Which He Claimed an Overpayment Within Three Years of the Due Date, Taxpayer Met the Statute of Limitations Contained in § 6511(b)(2) Incorporated by Reference into § 6512(b)(3)(B).

A. Under § 6511(a), Taxpayers Have Three Years in Which to File a Late Return Claiming an Overpayment in Order to Obtain a Refund.

The IRS initially conceded that under § 6511(a), the general statute of limitations on filing claims for refund, a taxpayer had three years in which to file a return showing an overpayment. The only late-filers that the IRS claimed were subject to a shorter statute of limitations were those taxpayers who received a Notice of Deficiency before they filed their return and then responded by filing a petition in the Tax Court. Appellee's Brief at 28-30, *Lundy* (No. 94-1260). In its Supplemental Brief, however, the IRS referred the Fourth Circuit to *Miller v. United States*, 38 F.3d 473 (9th Cir. 1994), which held that *all* late-filing taxpayers have only two years in which to file their return/claims. As noted above, the IRS conceded error in its brief to the Ninth Circuit, citing its own Revenue Ruling 76-511 which provides for a three-year period in which to file a late return/claim for refund. (L 40-42). Last April it told this Court it was reconsidering this ruling but it has not announced any decision at this time. Respondent's Brief at 9 n.5 *Richards v. Commissioner* (No. 94-1537). In a 1995 brief submitted to the United States District Court for the District of Vermont, the IRS again conceded this issue. (L 45-46).

After giving inconsistent advice to the Fourth and Ninth Circuits, the IRS continues to waffle before this Court. It seems to be asking this Court to choose between *Miller* and its own Revenue Ruling. (Pet. Br. 29-30). The IRS should either retract Revenue Ruling 76-511 and announce to this Court and the taxpaying public that the statute of limitations has been changed or reject *Miller*.

The Ninth Circuit misconstrued the statute in part because it did not understand the circumstances in which the two-year limitation on filing applies. Section 6511(a) contains two separate two-year filing requirements. The two-year rule set forth in the first clause of the first sentence applies to all taxes "in respect of which a taxpayer is required to file a return." Those taxpayers are required to file their claim for refund "within 3 years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later." So, the first two-year limitation only applies where the two-year provision provides a *longer* period than the three-

year provision. This is the only two-year rule discussed in IRS Publication 556, *Examination of Returns, Appeal Rights, and Claims for Refund*. (L 25-26). Example 3 (unnumbered) illustrates this two-year limitation which ordinarily would occur in connection with an audit. Since the first two-year filing requirement in the first clause applies to *any tax imposed in respect of which tax the taxpayer is required to file a return*, the two-year limitation described in the second clause of the first sentence, the one on which the IRS relies, applies only for taxes paid in respect to which a taxpayer is not required to file a return. Publication 556 does not contain an example of the application of the second two-year rule. Since Taxpayer was required to file a return, the second two-year rule does not apply to him.

The IRS quotes language from *Miller* that raises the specter of an unlimited statute of limitations on claiming refunds. (Pet. Br. 30) At first blush, interpreting the filing requirement of § 6511(a) to be satisfied by a return reporting an overpayment filed more than three years late may raise fears of stale claims for refund. *See Oropollo v. United States*, 994 F.2d 25, 30 (1st Cir. 1993); *Miller*, 38 F.3d at 475. Such fears are unfounded. Section 6511(b)(2)(A) contains the real teeth of the limitations provisions and limits the *amount* which can be refunded to the taxes paid within the three years preceding the filing of the claim for refund. So, while it is possible for a taxpayer to file a return/claim many years after the due date and still comply with the filing requirement of § 6511(a), it would not benefit a taxpayer who had overpaid his taxes more than three years before the claim was filed. *Mills v. United States*, 805 F. Supp. 448, 450 (E.D. Tex. 1992); *Domtar v. United States*, 435 F.2d 563, 567 (Ct. Cl. 1970). "[S]ection 6511(b)(2)(A) places a cap on recovery of a refund" which prevents stale claims. *Oropollo*, 994 F.2d at 27.

B. Taxpayer's Return Reporting an Overpayment Filed Within Three Years of Both the Date the Return Was Filed and the Date the Tax Was Paid Satisfied the Statute of Limitations.

1. Taxpayer's Return Also Constituted a Claim for Refund. As His Claim for Refund Was Filed Contemporaneously with His Return, the Claim Was Filed Within Three Years of the Return, and the Statute of Limitations on Filing Contained in § 6511(a) was Satisfied.

Taxpayer complied with the limitation on the time for filing a claim contained in § 6511(a). Treasury Regulation § 301.6511(a)-1 explains the requirements of that provision as follows:

> (1) If a return is filed, a claim for credit or refund of an overpayment must be filed by the taxpayer within 3 years *from the time the return was filed* or within 2 years from the time the tax was paid, whichever of such periods expires the later.
>
> (2) If *no* return is filed, the claim for credit or refund of an overpayment must be filed by the taxpayer within 2 years from the time the tax was paid. (emphasis supplied)

The two requirements in that provision are in the alternative. As Taxpayer did file a return, the alternative which applies to him is clearly the alternative pertaining to a filed return. Taxpayer filed his 1987 tax return in December 1990. That return showing an overpayment also constituted Taxpayer's claim for refund. Treas. Reg. § 301.6402-3(a)(5). Thus, Taxpayer filed his claim for refund contemporaneously with his return and, therefore, within three years of the time the return was filed as required by § 6511(a). Rev. Rul. 76-511, 1976-2 C.B. 428.

2. Because He Complied with the Filing Requirement of § 6511(a), Taxpayer Is Entitled to a Refund of His Overpayment from the Taxes Paid in the Three-Year Period Preceding the Filing of His Return/Claim for Refund.

The limitation on the amount that can be refunded, is contained in § 6511(b)(2). Section 6511(b)(2)(A) limits the amount which can be refunded to the taxes paid within the three-year period preceding the filing of the claim for refund. This three-year limitation applies, by its own terms, if "the claim [for refund] was filed by the taxpayer during the 3-year period described in [§ 6511(a)]." I.R.C. § 6511(b)(2)(A). Section 6511(b)(2)(B) provides that if a claim for refund was not filed within three years of the filing of the return, then the taxpayer can only recover the taxes paid within the two years preceding the filing of the claim.

Taxpayer submits that he has met all of the tests found on the face of the statutes involved and is entitled to a refund of the admitted overpayment for his tax year 1987. Treas. Reg. § 301.6511(b)-1(b). The return comprised both the return and the claim, satisfying the filing requirement of § 6511(a). Treas. Reg. § 301.6402-3(a)(5). His refund cannot exceed that portion of his taxes paid in the three years preceding the filing of the claim. I.R.C. § 6511(b)(2)(A). Taxes collected by means of withholding are deemed paid on April 15 of the year following the taxable year. I.R.C. § 6513(b)(1). The claim was filed on December 28, 1990, well within three years of the overpayment of his tax on April 15, 1988. He is entitled to a refund of his overpayment.

V. Taxpayer is Entitled to a Refund of his Overpayment Because he *Could Have Filed* a Valid Claim for Refund on the date the Notice of Deficiency was Mailed.[6]

A. The Language of § 6512(b)(3)(B) Supports the "Could Have Been Filed" Rather than the "Deemed Claim" Construction of the Statute.

Section 6512(b)(3)(B) limits any refund to the amount applicable under § 6511(b)(2) "if on the date of the mailing of the

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[6] The reference dates for compliance with the statute of limitations are different under Taxpayer's alternative arguments. If the Court determines that his actual return claim for refund is to be given effect for purposes of compliance with the statute of limitations he is entitled to a refund from taxes paid in the three years preceding the date Taxpayer's return claim for refund was filed in December 1990. If the Court determines that the taxpayer is entitled to a refund because he could have filed a valid claim for refund on the date the Notice of Deficiency was mailed, September 26, 1990, he would be entitled to a refund from taxes paid in the three years preceding that date. In this case it would not matter on which theory this Court ruled for Taxpayer. Both possible reference dates are more than two but less than three years from the date the taxes were deemed paid under § 6513, April 15, 1988. However, the theory employed for a decision favorable to Taxpayer, here, would matter to a taxpayer who is mailed a Notice of Deficiency after two but before three years from the date the taxes were paid but who does not file a return/claim within three years of that date. In cases such as *Anderson v. Commissioner*, 36 F.3d 1091 (4th Cir. 1994) and *Galuska v. Commissioner*, 5 F.3d 195 (7th Cir. 1993), the taxpayers would not be entitled to a refund under Taxpayer's first argument, but would be entitled to a refund under Taxpayer's "could have filed" argument.

notice of deficiency a claim had been filed (*whether or not filed*) stating the grounds upon which the Tax Court finds an overpayment." (emphasis added). The parenthetical "whether or not filed" modifies the phrase "if a claim had been filed." Giving these words their ordinary meaning, the most reasonable interpretation is that the parenthetical eliminates any requirement that a claim for refund actually be filed and that a taxpayer is entitled to a refund if he could have filed a claim for refund on that date. This interpretation makes sense because there is no requirement that an administrative claim for refund be filed in order to invoke the refund jurisdiction of the Tax Court. The purpose of the language "if on the date of the notice of deficiency was mailed a claim had been filed" is to provide a reference date for application of the statute of limitations.

The only plausible reason for incorporating § 6511 into § 6512 by reference is to apply the same statute of limitations to taxpayers who petition the Tax Court as that applied to all other taxpayers. If Congress had intended that there be a shorter statute of limitations in the Tax Court it would have drafted a provision expressly applicable to that Court only. This would be particularly true because, under the construction of the IRS, the statute is applied unevenly and capriciously to the class of taxpayers who petition the Tax Court . *See infra* Section IX D.

Taxpayer *could have* filed a timely claim for refund on September 26, 1990, the date the Notice of Deficiency was mailed (which was less than three years from April 15, 1988, the date on which the tax was paid). If Taxpayer had declined to file a petition in the Tax Court, he would have received a refund administratively. I.R.C. § 6511; Rev. Rul. 76-511, 1976-2 C.B. 428. Therefore, he is also entitled to a refund of his overpayment in the Tax Court. The Tax Court itself has often stated this to be the proper construction of the statute. *Estate of Baumgardner v. Commissioner*, 85 T.C. 445, 449 (1985); *Wheeler, Sr. v. Commissioner*, 38 T.C.M. (CCH) 1236, 1238 (1979). Yet, surprisingly, the Tax Court has not addressed the inconsistent result obtained under the line of cases accepting the "could have filed" interpretation (taxpayer obtains refund) and the result in the line of cases accepting the "deemed claim" notion (taxpayer loses refund).

B. The Legislative History Supports the "Could Have Filed" Rather than the "Deemed Claim" Construction of the Statute.

Revenue Act of 1942: In the Revenue Act of 1942, § 169(b), 56 Stat. 798, Congress amended § 322(d), the predecessor of § 6512(b). The legislative history explained the changes and the reasons therefor.

> In order to give the taxpayer the privilege to claim an overpayment before the [Tax Court] by such amendments to his petitions as may be allowed under the rules of the [Tax Court], without the period of limitations running against the refund of such overpayment after the notice of deficiency is mailed, [section 322(d) is amended] to provide that the period of limitations which determines the portion of the tax which may be credited or refunded is measured from the date the notice of deficiency is mailed, rather than from the date the petition is filed.

H.R. Rep. No. 2333, 77th Cong., 2d Sess. 121 (1942).

This Report is illuminating in two regards. It illustrates an assumption by Congress that § 322(d), prior to amendment, did not permit the IRS to shorten the taxpayer's limitation period by the mailing of a notice of deficiency. The taxpayer controlled the tolling of the statute by filing a petition or amended petition containing the grounds for determining an overpayment. It also convincingly evidences a congressional intent that the statute was amended to *improve* the taxpayer's situation. As amended, the mailing of the notice of deficiency, which of course precedes the petition in response, tolls the running of the statute of limitations *against* the taxpayer. Any grounds contained in a subsequently filed amendment to the Tax Court petition will not be time- barred from consideration by the Tax Court. This legislative history clearly indicates that § 322(d), and its successor, § 6512(b)(3)(B) granted to the Tax Court jurisdiction to determine a refund if a timely claim for refund *could have been filed* by the taxpayer on the date the Notice of Deficiency was mailed. The purpose of the 1942 legislation was to aid taxpayers, not to empower the IRS to shorten the statute of limitations by mailing a Notice of Deficiency. This interpretation is

consistent with that of a noted commentator who wrote a definitive history of the Tax Court, including a detailed review of the Tax Court's refund jurisdiction. Harold Dubroff, *The United States Tax Court: An Historical Analysis* 414-27 (1979).[7]

> In 1942 . . . the statute was amended to allow credit or refund if the mailing of the deficiency notice which resulted in the [Tax Court] proceeding was within the statutory period of the overpayment. [Revenue Act of 1942, ch. 619, § 169(b), 56 Stat. 877.] Thus, whether or not the original petition claimed an overpayment, *claim therefor would not be time barred if such a claim could validly have been made at the time of mailing of the deficiency notice.* [I.R.C. § 6512(b)]

Id. at 419 (emphasis added).

It is significant that Professor Dubroff cited § 6512(b) of the 1954 Code, obviously not in existence at the time of the 1942 amendments to its predecessor, § 322(d). This reference evidences his correct understanding that Congress intended no substantive change when it enacted § 6512(b)(3)(B) of the 1954 Code and that under both that section and its predecessor, § 322(d), as amended, a late-filing taxpayer who was issued a Notice of Deficiency after two but before three years was entitled to a refund if the Tax Court determined that he had overpaid his taxes. The IRS quarrels with the interpretation of § 322 by the Fourth Circuit and Professor Dubroff. (Pet. Br. 24-25). That section provided in relevant part:

> (d) Overpayment Found By Board [Grant of refund jurisdiction]
>
> No such credit or refund shall be made of any portion of the tax unless the Board determines as part of its decision (1) that such portion was paid (A) within two years before the filing of the claim, the mailing of the notice of deficiency, or the execution of an agreement by both the

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[7] This text has been cited by the United States Supreme Court and, on numerous occasions, by the Tax Court.

> Commissioner and the taxpayer . . . whichever is earliest, *or* (B) within three years before the filing of the claim, the mailing of the notice of deficiency, or the execution of the agreement, whichever is earliest, *if the claim was filed, the notice of deficiency mailed, or the agreement executed within three years from the time the return was filed by the taxpayer* . . . .

I.R.C. § 322 (1953) (emphasis added).

The word "or" between the two-year limitation of § 322(d)(1)(A) and the three-year limitation of § 322(d)(1)(B) indicates that they were to be applied in the alternative. The highlighted language makes clear that the prerequisites for application of the more favorable three-year limitation period were stated in the alternative. One of the alternatives was that the taxpayer file his claim for refund within three years of the time the return was filed which was accomplished by the filing of a return showing an overpayment. Rev. Rul. 57-354, 1957-2 C.B. 913, superseded in (not relevant) part by Rev. Rul. 66-118, 1966-1 C.B. 290.

Internal Revenue Code of 1954: The House Report that accompanied the legislation which enacted the Internal Revenue Code of 1954 stated that "[t]he 3-year period of limitations for assessment or refund now applying in the case of the income, estate or gift taxes is applied to excise taxes, which presently have a 4-year limitation period." H.R. Rep. No. 1337, 83d Cong., 2d Sess. (1954), *reprinted in* 1954 U.S.C.C.A.N. 4017, 4134. The Report also states that § 6511 extends to all taxpayers required to file a return the provisions of existing law and refers to the continuation of the existing 3-year period of limitations for assessment or refund now applying. *Id.* at 4563.

Act of Oct. 23, 1962: In 1962, Congress added clause (C) to subparagraph 6512(b)(3) [then 6512(b)(2)]. Act of Oct. 23, 1962, Pub. L. No. 87-870, 76 Stat. 1158. The Senate Finance Committee explained the new provision:

> Since the 1954 enactment, moreover, the Internal Revenue Service has in practice interpreted the law as permitting the refund of amounts where valid claims have been timely

> filed, as well as where these claims *could have been filed* on the date of the mailing of the notice of deficiency.
>
> Your committee believes it is desirable to amend the language of present law (sec. 6512(b)([3])) to make it clear that the statute conforms with the interpretation of this section followed by the service since the enactment of the 1954 Code.

S. Rep. No. 2273, 87th Cong., 2d Sess. 1962, *reprinted in* 1962 U.S.C.C.A.N. 3987, 4001-02

(emphasis added).

Although the provision enacted, § 6512(b)(3)(C), is not pertinent to the issue here, the Senate Report constitutes irrebuttable evidence of two important points. First, it is evidence of the existence of the administrative practice of the Service to allow claims for refund where a claim could have been filed on the date of the mailing of the Notice of Deficiency and congressional awareness of such practice. Second, it is evidence of the understanding by the Senate Finance Committee that § 6512(b) grants jurisdiction to the Tax Court to determine overpayments and allow refunds *where a valid claim could have been filed* on the date the Notice of Deficiency was issued.

VI. The Contention of the IRS That the "Plain Language" of § 6512(b)(3)(B) Requires Denial of Taxpayer's Refund Does Not Withstand Analysis.

A. The IRS Contention That, under the "Plain Language" of the Statute, Taxpayer's Claim Was Barred by the Statute of Limitations Is Belied by the Conduct and Statements of IRS Employees at All Levels.

The conduct of those responsible for administering the statute in this case was and is inconsistent with what the IRS contends is the plain meaning of the statute. If, in fact, under the plain language of the statute, Taxpayer's refund claim was barred by the statute of limitations the moment he dropped his Tax Court petition in the mail

box, why did IRS employees at all levels proceed as if he was entitled to a refund of any overpayment?

After mailing the Notice of Deficiency to Taxpayer, one IRS official after another treated his claim as having been timely filed. The Appeals Officer acknowledged Taxpayer's petition in the Tax Court as early as March 1991, yet she had the Taxpayer spend months substantiating all of his deductions and credits. She never raised the limitations defense. In fact, she initiated a letter telling him that "the check was in the mail." Moreover, Counsel for the IRS filed an answer without raising a limitations defense. She reported to the trial judge in a conference call with Taxpayer that the case had been resolved and that a refund would be forthcoming. It was not until five days before the call of the calendar that the IRS raised the statute of limitations issue before the Tax Court.

If the language of the statute so plainly dictates a two-year statute of limitations in the Tax Court, why have the Commissioner and other IRS officials communicated to the public, through press releases and interviews, that there exists a three-year period in which to claim a refund? (L 29-39).

If the language of the statute so plainly dictates a two-year statute of limitations in the Tax Court, why do the official IRS publications distributed to taxpayers to assist them in the preparation of their returns and refund claims indicate that the limitation period for claiming refunds is three years? (L 25-28). These publications do not even contain an asterisk or footnote to indicate to taxpayers that the limitation period may be shorter if they file a petition in the Tax Court.

The conduct of IRS employees and all IRS communications to the public, including a revenue ruling, without any reference to the forum of the claim, indicate that the IRS itself interprets the statute as meaning that a taxpayer is entitled to a refund of an overpayment if he files a return within three years of the due date. This represents a correct interpretation of the statute.

B. The IRS Reads into § 6512(b)(3)(B) Three Concepts Which Cannot Be Found in the "Plain Language" of the Statute

The IRS concedes that the Taxpayer overpaid his taxes. The half-hearted defense of *Miller* aside, it is without question that, had the Taxpayer ignored the Notice of Deficiency and filed a complaint in either the Eastern District of Virginia or the Claims Court, the IRS would have issued him his refund. Rev. Rul. 76-511, 1976-2 C.B 428. What the IRS argues is that because the Taxpayer filed a petition in Tax Court a different result must follow.

Throughout this litigation, the IRS has chanted the mantra that, under "the plain language" of the statute, Taxpayer's refund must be denied. The IRS hopes that its "plain language" pronouncement will insulate its argument from scrutiny. However, stating that the "plain language" of the statute supports the denial of Taxpayer's refund does not make it so. In fact, rather than relying on the "plain language" of the statute, the position of the IRS is totally dependent on reading into § 6512(b)(3)(B) three unexpressed and complex concepts. These unexpressed concepts are contrary to the language of the statute, the intent of Congress as evidenced by the legislative history, and the statutory framework.

To succeed in its argument, the IRS must persuade this Court that all of the following concepts are required by the "plain language" of § 6512(b)(3)(B):[8]

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[8] The IRS position is that the mailing of the Notice of Deficiency constitutes a "deemed" or "imputed" claim of the taxpayer and that on the mailing date no return had been filed so Taxpayer could only obtain a refund of taxes paid in the two years prior to the "deemed claim." (Pet. Br. 17). The IRS argument fails if this Court does not find a "deemed claim" in the statute. The IRS fails even if this court accepts the "deemed claim" concept, but considers such claim to be valid and in the form of a return. In that case, the claim would have been filed simultaneously with the return and, hence, within three years of the return. Section 6511(b)(2)(A) would, by its own terms, apply and Taxpayer would be entitled to a refund from taxes paid in the three years preceding September 26, 1990, the date of the "deemed claim." Finally, the IRS fails if this Court agrees with Taxpayer that his actual return/claim for refund, filed within three years of the dates the return was filed and the taxes paid, should be given effect for purposes of compliance with the statute of limitations.

(1) the mailing of a Notice of Deficiency by the IRS constitutes a "deemed claim" for refund filed by a taxpayer;

(2) the Notice of Deficiency constitutes a "deemed claim" for refund even though it is not in the form of a return and does not contain a detailed statement of the grounds on which the refund is based as required by the Treasury Regulations;

(3) the "deemed claim" for refund of a taxpayer cannot be amended or superseded by the taxpayer's actual return/claim for refund, even if filed within the three-year limitation period.

1. The Language of § 6512(b)(3)(B) Does Not Support the "Deemed Claim" Notion of the IRS.

The denial by the IRS of the Taxpayer's claim for refund is totally dependent on the notion that the mailing of the Notice of Deficiency by the IRS constitutes the filing of a "deemed claim" by Taxpayer. The fragment of § 6512(b)(3)(B) which reads "if on the date of the mailing of deficiency a claim had been filed (whether or not filed)" was understood by the trial court as a direction "to assume a claim had been filed--a deemed claim concept." (Pet. App. 39a-40a). The Fourth Circuit correctly concluded that had Congress intended that the date the IRS mailed a Notice of Deficiency was to be deemed the date on which Taxpayer filed his claim, "Congress could have said so explicitly." (Pet. App. 10a). The IRS has repeatedly advised the Tax Court and courts of appeals that the "plain language" of the statute supports the existence of this "deemed claim." Appellee's Brief at 21, *Lundy* (No. 94-1260). The Tax Court and courts of appeals have, without analysis, accepted the IRS interpretation. Now that the Fourth Circuit has rejected the "deemed claim" concept, in part because the words "deemed" and "considered" appear so many times in the Code, but not in § 6512, the IRS has downplayed the significance of the word "deemed" and renamed its Notice of Deficiency as an "imputed claim" of Taxpayer.

However it is expressed, the IRS wants this Court to consider the mailing of the Notice of Deficiency to be deemed, treated or considered as if Taxpayer had filed a claim for refund on the date the Notice of Deficiency was mailed, even though he had not, in fact, done so. When Congress wants something that has not occurred to be treated as if it had in fact occurred, it uses the words "deemed" and the word "considered" interchangeably to achieve that result. The interchangeability of these terms is illustrated by their use in § 6513.[9]

Section 6512 incorporates § 6511 by reference which, in turn, cross-references § 6513, so it is certain that Congress considered all three provisions together. The word "deemed" is used once in § 6511 and four times in § 6513, but not once in § 6512. The word "considered" is used once in § 6511 and seven times in § 6513, but not once in § 6512. The express use of the word "deemed" and "considered" in these two provisions alone would support the Taxpayer's argument against implying either word in § 6512(b)(3)(B) or any other synonym designed to accomplish the same result.

The words "deemed" and "considered" each appear once or multiple times in more than three hundred sections of the Internal Revenue Code, but *not* in § 6512(b)(3)(B). Under these circumstances, it is unreasonable to assume that if Congress intended that the mailing of the Notice of Deficiency be considered a taxpayer's claim for refund but inadvertently failed to use the word "deemed" or "considered." If Congress wished to create such a concept, "deemed" or "considered" would have appeared in the statute.

The IRS now employs a new adjective to describe Taxpayer's non-claim: "imputed." It is late in the game to switch. The IRS

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[9] Section 6513 is entitled "Time Return Deemed Filed and Tax Considered Paid." The operative rule of § 6513(a) states that a return filed before the due date "shall be considered" as filed on the due date and § 6513(b) provides that withholding tax is "deemed to have been paid" by the taxpayer on the due date.

downplays the use of the word "deemed" as semantical.[10] (Pet. Br. 23). Yet, every case on which the IRS relies has based its decision on the existence of a "deemed claim." The more important point, though, is that if Congress intended that the Notice of Deficiency mailed by the IRS to be considered the taxpayer's claim for refund, it would have expressly so stated and it would not matter whether it used the word "deemed," "considered," "treated," or even "imputed" to achieve that result. The fact is that none of those terms can be found in § 6512(b)(3)(B).

This Court has long construed statutes "without resorting to subtle and forced construction for the purpose of either limiting or extending its operation." *United States v. Temple*, 105 U.S. 97, 99 (1881). "When the language is plain, we have no right to insert words and phrases, so as to incorporate in the statute a new and distinct provision." *Id.* The corollary of that proposition is that if words and phrases must be inserted into a statute to clarify its meaning, as the IRS seeks to do here, its meaning cannot be "plain." The construction sought by the IRS is also in conflict with the principle recently enunciated by this Court that a common sense approach should be employed when construing the Code and that formalistic and strained constructions to limit the waiver of sovereign immunity are disfavored. *United States v. Williams*, 115 S.Ct. 1611, 1618 (1995).

2. Any "Deemed Claim" Should Be Considered to Be in the Form of a Return.

If Congress did intend that a Notice of Deficiency mailed by the IRS be equivalent to a taxpayer's claim for refund, surely it must have been intended that such a claim would be a valid claim. An income tax return showing an overpayment constitutes a claim for refund. Treas. Reg. § 301.6402-3(a)(5). A valid claim for refund must be filed on the appropriate tax form. Treas. Reg. § 301.6402-3(a)(1). The IRS' position is dependent on a finding that the statute

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[10] The semantics are that of the IRS. Whether we refer to the claim as "deemed," "considered," "hypothetical" or "imputed" the IRS is still asking this Court to find that its Notice of Deficiency *mailed to* the taxpayer is the taxpayer's *fictitious* claim for refund.

not only instructs the Court to find a "deemed claim" but a blank claim as well. Any "deemed claim" should be considered to be on a Form 1040 as the Treasury Regulations require.

If a Notice of Deficiency mailed by the IRS is the claim for refund filed by the Taxpayer, what are its terms? If the IRS is going to read into § 6512(b)(3)(B) a concept of a "deemed claim," why not a concept of a "deemed return"? The IRS fails to take into account the language in § 6512(b)(3)(B) following the fragment that provides its basis for the "deemed claim" concept:

> if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) *stating the grounds upon which the Tax Court finds that there is an overpayment* . . . . (emphasis supplied).

The construction of the IRS treats the emphasized phrase as surplusage. The IRS, by ignoring this phrase, violates the rule that a statute should be construed so that all of its words are given effect. *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). Treasury Regulation § 301.6402-2(b) also requires that a claim for refund contain a detailed statement of the grounds for the claim.[11]

Even if the language of § 6512(b)(3)(B) is assumed to support the existence of a "deemed claim," what "plain language" of the statute requires that the claim be devoid of content and, thereby, invalid under both the statute and the Treasury Regulations? The IRS is pursuing this strained construction in order to confiscate the refunds of unsuspecting taxpayers lured into the Tax Court.[12] This

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[11] A document which contains sufficient detail to compute the taxpayer's liability may constitute a return, even if not submitted on the designated form. Rev. Rul. 74-203, 1974-1 C.B. 330. The "grounds upon which the Tax Court finds that there is an overpayment" would have to be the same information provided on a return.

[12] Taxpayer must reluctantly characterize the collective actions of the IRS as a "trap for the unwary." Taxpayer believes that all the IRS employees with whom he dealt acted in good faith and believed that he was entitled to a refund of the amount finally determined to have been overpaid. Taxpayer also believes that the Commissioner and other IRS personnel who communicated to taxpayers through the

construction, which produces absurd results, characterized by the Fourth Circuit as "pernicious effects", is without any support in the language of the statute. (Pet. App. 10a).

The term "claim" should have the same ordinary meaning in one section as it does in another, *Crane V. Commissioner*, 331 U.S. 1, 12 (1947), particularly where, as here, "the functional relation of the two sections requires that the word mean the same in one section that it does in the other." *Id.* Section 6512(b)(3)(B) incorporates § 6511(b)(2) by reference, which, in turn, refers to claims "filed by the taxpayer." The IRS requires that the "claim" referred to in § 6511 must be submitted on the proper income tax return form. Treas. Reg. § 301.6402-3(a)(1). Any "deemed claim" in section 6512(b)(3)(B) should conform to the same requirement.

The IRS responded weakly to Taxpayer's argument below. It referred to Treasury Regulation § 301.6402-3(a)(5) which provides that an income tax return showing an overpayment constitutes a claim for refund and simply argued that the converse is not necessarily true. Appellee's Brief at 23, *Lundy* (No. 94-1260). The IRS ignored this issue in its opening brief to this Court. Noticeably absent from every brief that it has filed in the Tax Court, the Fourth Circuit and this Court are any references to Treas. Reg. § 301.6402-3(a)(1) which *requires* that if, as here, a claim for refund has not been previously filed, it must be submitted on the appropriate tax return form and Treasury Regulation § 301.6402-2(b) which requires that a claim must contain a detailed statement of grounds. Compliance with these regulations are essential in order to submit a valid claim for refund. These regulations should also be employed to determine the composition of any "deemed claim." To confiscate Taxpayer's refund, the IRS must ignore its own regulations.

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media that they had three years in which to claim refunds also acted in good faith. Taxpayer also believes that those responsible for the content of IRS publications and the drafting of the Notice of Deficiency were unaware of the litigation posture of the IRS and, for that reason, failed to include a warning that the statute of limitations could be shorter for Tax Court petitioners. Just the same, the combination of their actions and communications and the actions of Chief Counsel effectively amount to a trap for taxpayers who have overpaid their taxes and unwittingly elect to file a petition in the Tax Court.

Therefore, this Court should conclude that any "deemed cl:. for refund filed by the Taxpayer was embodied in a retu:n i.. would therefore have also been deemed to have filed his claim for refund simultaneously with that return and would be entitled under § 6511(b)(2)(A) to a refund of all taxes paid in the three years preceding the filing of the claim. Since the Notice of Deficiency/"deemed claim" was deemed filed on September 26, 1990, less than three years from April 15, 1988, the date the taxes were paid, Taxpayer is entitled to a refund of his overpayment.

3. The Actual Return Filed by the Taxpayer Should Supersede or Amend Any "Deemed Claim."

The several references to filing "by the taxpayer" in § 6511 grant the right to file a claim for refund to the taxpayer. This right should not be unilaterally abrogated by the Commissioner's mailing of a Notice of Deficiency/ "deemed claim for refund."

Under the third prong of its tortured construction of § 6512(b)(3)(B), the IRS disregards the actual claim /return filed "by the taxpayer." The IRS concedes that it treated Taxpayer's return as valid for purposes of determining his "correct liability and the existence of an overpayment." (Pet. Br. 17 n.6). Undoubtedly, if a deficiency had been determined to exist, instead of an overpayment, the IRS would have treated the return as valid for that purpose, as well. However, Taxpayer's return was treated as a nullity for purposes of compliance with the statute of limitations. *Id.*

In an analogous situation, the Tax Court, in a reviewed decision, held that taxpayers' actual return claiming joint return status (with a lower tax liability) superseded a substitute return prepared by the IRS electing married, filing separate status. *Millsap v. Commissioner*, 91 T.C. 926, 938 (1988). The Tax Court rejected the IRS' position that the preparation of the substitute returns pursuant to § 6020 precluded the taxpayers from electing joint filing status for purposes of § 6013. Although the IRS had authority to prepare the substitute returns, the taxpayers retained all of their rights to contest the deficiency, as well as the elements, including filing status, which comprise it. "Where several statutory provisions conflict in their application, we should attempt to interpret or reconcile them in a manner which will not

cause an arbitrary or an unreasonable result." *Millsap*, 91 T.C. at 937 (citing *Porter v. Commissioner*, 288 U.S. 436 (1933)). Where there are apparently conflicting provisions, the Court should attempt to "give effect to each if we can do so while preserving their sense and purpose." *Id.* (citing *Haggar v. Helvering*, 308 U.S. 389 (1940)); *see also Menasche*, 348 U.S. at 538-39 (The Code should be construed so as to give effect to all the words of the related provisions.).

In *Haggar*, the statute permitted the taxpayer to state the base for a capital stock tax. Once the base value was declared "in its first return under this section" it could not be amended in later years. The taxpayer mistakenly understated the value on a return filed before the due date but filed an amended return with a corrected valuation, also before the due date. The IRS rejected the amended return because it was not the "first return." The Supreme Court observed that the purpose of the statute was to allow the taxpayer to fix for itself the amount of the capital stock base during the first year. The Court rejected the IRS position:

> To construe "first return" as meaning the first paper filed as a return, as distinguished from the paper containing a timely amendment, which, when filed . . . is to defeat the purposes of the statue by dissociating the phrase from its context and from the legislative purpose in violation of the most elementary principles of statutory construction.

Haggar v. Helvering, 308 U.S. 389, 396 (1940).

The rationale of *Haggar* and *Millsap* is applicable in this case. Taxpayer's actual return\claim for refund should be given effect for purposes of compliance with the statute of limitations in order to give effect to all the relevant statutory language. Interpreting § 6512(b)(3)(B) to allow Taxpayer's actual return to supersede any "deemed" or "imputed" claim would provide a rational meaning for the words "claim for refund . . . shall be filed by the taxpayer" in § 6511. Just as the taxpayer in *Haggar* was entitled to exercise his right to amend his declaration of value before the due date and just as the taxpayers in *Millsap* were allowed to file a joint return which superseded the substitute returns prepared by the IRS, so should Taxpayer be allowed to file a return/claim within three years of the due date which is given effect for purposes of section 6511.

IRS justification for abrogating the rights to which the Taxpayer would otherwise be entitled is even more tenuous here than in *Millsap*. In *Millsap*, the IRS had express statutory authority for preparing the substitute return, whereas here the IRS must rely on an imputed "deemed claim." The Tax Court's failure to give effect to Taxpayer's return/claim for refund filed in December 1990 is inconsistent with its rationale in *Millsap*. The *Millsap* rationale should prevail.

Alternatively, Taxpayer submits that his actual return/claim should be accepted as an amendment to any "deemed claim" under the principles of *Bemis Bros. Bag. Co. v. United States*, 289 U.S. 28 (1933), recently followed in *Mutual Assurance, Inc. v. United States*, 56 F.3d 1353 (11th Cir. 1995). Mutual had filed its claim for refund which was granted. Subsequently, the IRS discovered during a field examination that a miscalculation had caused Mutual to understate its refund claim. A second refund claim filed by the taxpayer was denied by the IRS on the ground that the three-year period for filing claims for refund had expired. According to the IRS the first payment extinguished the original claim, so that no claim existed that could be amended. The Eleventh Circuit concluded that the claim for refund contained a defective prayer for relief, which could be amended. That rationale applies in this case. Any "deemed claim" for refund must state the grounds upon which the Tax Court determines that an overpayment has been made. I.R.C. § 6512(b)(3)(B). The Taxpayer's executed return should be allowed as an amendment to the "deemed claim." Taxpayer's "deemed return/claim" was filed on September 26, 1990, well within three years of the date he paid his taxes, April 15, 1988. He is entitled to a refund of his overpayment.

In sum, the IRS' obligation when it receives a claim for refund, even a "deemed claim" for refund, is to objectively consider factors which reduce, as well as increase, a taxpayer's liability. In the words of the Supreme Court, "[if the IRS determines that its] assessment is erroneous . . . [j]ustice will then require that it be changed to that extent." *Bemis Bros. Bag.*, 289 U.S. at 35.

VII. The IRS Engaged in a Longstanding Administrative Practice of Granting Refunds to Taxpayers Who Filed Their Return/Claim for Refund Within Three Years of the Due Date and this Administrative Practice Has Been Incorporated into the Code under the Legislative Reenactment Rule.

The Fourth Circuit correctly surmised that the IRS changed its administrative practice sometime around 1991. (Pet. App. 21a). It may be more accurate to state that, while the IRS' practice at the field level has remained the same, its litigation posture has changed. The IRS practice is evidenced in a number of ways: All IRS employees with whom Taxpayer dealt acted on the assumption that he was entitled to a refund of any overpayment. IRS communications to the public through the media state that taxpayers have three years in which to file their refund claims (L 29-39). No special rule is set forth for the Tax Court. IRS publications distributed to taxpayers to assist them in the preparation of their returns and appeals also indicate a three-year period in which to claim a refund. (L 25-28). The Notice of Deficiency does not warn taxpayers that they may be subject to a shorter statute of limitations and may forfeit their refunds if they accept the invitation contained in that Notice by filing a Tax Court petition. (L 1).

It is also telling that the IRS has not set forth its three-pronged "deemed claim" interpretation of § 6512(b)(3)(B) in a Treasury Regulation. Treasury Regulations are employed to flesh out the bones of the statute. *Estate of Sherrod v. Commissioner*, 774 F.2d 1057, 1064 n.9 (11th Cir. 1985); *J.H. Rutter Rex Mfg. Co. v. Commissioner*, 853 F.2d 1275, 1286 (5th Cir. 1988). The IRS' complex extrapolation from the statute urged upon this Court would seem to be a particularly appropriate subject of an explanatory regulation. The need for a regulation is all the more compelling because the consequences to individual taxpayers are so drastic.

The statute of limitations for claiming refunds in the Tax Court has been substantially unchanged since 1942. The first time the Tax Court denied a refund to a taxpayer who actually filed a return showing an overpayment within three years of the due date was in 1992. A flood of cases followed. (L 47). The only plausible explanation for this litigation history is a change in IRS administrative practice or IRS litigation posture.

The practicing tax bar accepts without question that a taxpayer is entitled to a refund if he could have filed a valid claim for refund on the date the Notice of Deficiency is mailed. This interpretation is taught to practitioners by ALI ABA as part of its continuing legal education function.

> The overpayment jurisdiction of the Tax Court, which exists only when the deficiency jurisdiction of the court has already been properly invoked, permits the court to turn the tables on the government and, instead of finding that the taxpayer has underreported his tax (that is, that there is a deficiency), conclude that he has overpaid instead. Although a properly filed refund claim is not a jurisdictional prerequisite to a Tax Court overpayment determination, the overpayment jurisdiction of the court is carefully drawn to avoid expanding the powers of the court beyond the Commissioner's underlying power to issue a refund. *Thus, on the date that the notice of deficiency was issued, the taxpayer must have been in a position either to file a timely claim for refund or to file a timely refund suit on a timely filed claim in order to permit the Tax Court later to declare an overpayment of the amount in question.* [§ 6512(b) and cross-referenced subsections in § 6511(b)] (emphasis supplied).

Taylor et. al., *Tax Court Practice* 16 (8th Ed. 1993).

The IRS has had numerous opportunities throughout this litigation, including its brief to this Court, to confront these facts but it has made no attempt to do so. Facts do not cease to exist because they are ignored. Aldous Huxley, *A Note on Dogma*. The only "facts" offered by the IRS to show that such a practice did not exist are quotations from Tax Court opinions describing the IRS litigation posture. (Pet. Br. 27-28). The response of the IRS to the facts suggesting the existence of an administrative practice is that it is a "figment of [Taxpayer's] imagination." Appellee's Brief at 30 n.12, *Lundy* (No. 94-1260).

The longstanding administrative practice of the IRS to grant refunds to taxpayers who file their return/claim for refund within three years of the due date has survived several reenactments of the

Code. It has thus been incorporated into the statute under the legislative reenactment rule. *Fribourg Navigation Co. v. Commissioner*, 383 U.S. 272, 283 (1966).

VIII. The Construction of § 6512(b)(3)(B) Urged by the IRS Conflicts with Other Code Provisions Which Are Part of the Statutory Framework.

The IRS asks this Court to focus on a short fragment of a clause of a statute which is part of what the Tax Court refers to as an "intricate" statutory framework but it also asks that this fragment be viewed in isolation and that the statutory framework be ignored.

Legislation is not enacted clause by clause, sentence by sentence, or even section by section. A court's interpretation of a single provision necessitates consideration of all related provisions. *See Commissioner v. Tufts*, 461 U.S. 300 (1983). In rejecting an interpretation of one section that would be in conflict with another, the Court stated that "[s]uch a result would be to construe 'one section of the Act . . . so as . . . to defeat the intention of another or to frustrate the Act as a whole.'" *Id.* The construction of the IRS conflicts with the purpose of several other Code provisions within the statutory framework and is inconsistent with the mandate of *Tufts*.

Section 6511. As noted in the earlier discussion of *Haggar* and *Millsap*, the construction placed on section 6512(b)(3)(B) by the IRS would deprive taxpayers of the right afforded to them by section 6511 to file their own claims for refunds.

Section 6512(a). In 1934, Congress gave the Tax Court jurisdiction to determine whether a taxpayer had complied with the statute of limitations and explained that the purpose of the legislation was to permit issues regarding a taxpayer's liability to be determined in a single forum. *Barton v. Commissioner*, 97 T.C. 548, 554 (1991); H.R. Rep. No. 704, 73rd Cong., 2d Sess. 38 (1934).

In *Estate of Baumgardner v. Commissioner*, 85 T.C. 445 (1985), a Notice of Deficiency asserted a substantial additional tax liability. Instead, an overpayment was found to exist by the Tax Court. During the course of litigation, the parties agreed on the amount of

the tax that was overpaid and the issue was whether [illegible] § 6512 included the overpaid tax only or also included [illegible] due the taxpayer as a result of the overpayment. The Tax Court stressed the necessity of construing its refund jurisdiction broadly in light of section 6512(a)'s prohibition against suits in the district courts or Claims Court by taxpayers who had previously filed a Tax Court petition. This indicated "a clear statutory intent that, in appropriate circumstances, the Tax Court should be able to determine an overpayment to the exclusion of other Tax forums. This intent would be frustrated by a reading of section 6512(b) that limits the Tax Court's jurisdiction to determining an 'overpayment' which varied from 'overpayments' that the excluded forums could have found." *Estate of Baumgardner*, 85 T.C. at 450-51.

In *Barton v. Commissioner*, 97 T.C. 548, 554 (1991), the Tax Court also recognized that the 1934 legislation required it to construe its refund jurisdiction broadly so as to avoid bifurcation of litigation. The court flatly stated that once the Tax Court obtained jurisdiction to determine a deficiency it also acquired jurisdiction to determine an overpayment. 97 T.C. at 551-52.

The Tax Court's narrow construction of its refund jurisdiction in this case is inconsistent with these two well-reasoned reviewed decisions. The rationale of *Baumgardner* and *Barton* is compelling and should be applied here. Sections 6511 and 6512 should be construed so that the refund jurisdiction of the Tax Court and the other refund forums is concurrent.

Section 6501. The legislative history clearly indicates that Congress intended that there be symmetry between the time in which the IRS can assess a deficiency under § 6501 and the time in which taxpayers can claim refunds under § 6511. Congress has never indicated that there be a different rule applicable to taxpayers who elect to file a petition in the Tax Court.

As early as 1918, Congress indicated that symmetry was intended. S. Rep. No. 617, 65th Cong., 3d Sess. 10 (1918). In 1934, Congress lengthened both the statue of limitations on assessments and refund claims from two to three years. Revenue Act of 1934, Pub. L. No. 73-216, 48 Stat. 680. The Senate Report indicated that the two limitation periods should be correlative. S. Rep. No. 558,

73d Cong., 2d Sess. 44 (1934). The 1954 legislative history, discussed above in Section V. B. of this brief also evidences congressional intent that there be symmetry between the statute of limitations on assessments and refund claims.

Section 6511(a) of the 1954 Code, as originally enacted, contained an unintended change. It provided that a claim for refund must be filed within three years of the due date, rather than three years from the date the return was filed, as under prior law. The statute was silent as to the effect of extensions. The Service ruled that a claim filed more than three years from the due date would be barred by the statute of limitations.[13] The change in statutory language which supported the Service's ruling was inadvertent and § 6511(a) was amended by the Technical Amendments Act of 1958, Pub. L. No. 85-866, § 82(a), 1958 U.S.C.C.A.N. (72 Stat. 1606) 1925. With regard to § 6511(a), the Senate Report stated:

> *(a) Period for filing claim.* Under present law a claim, to be valid, must in general be filed within 3 years from the due date of the return, without regard to any period of extension granted for the filing of the return (or within 2 years from the time of tax payment, whichever is later). However, the rule with respect to assessments is that the period of limitation is 3 years from the date the return was actually filed, whether or not filed when it was due. To correlate these rules the House bill (by amending sec. 6511(a)) provides that a claim for refund or credit of any tax may be filed within 3 years from the time the return was actually filed (or, as under present law, within 2 years from the time of payment, whichever is later). Your committee has accepted this change.

[13] Rev. Rul. 57-354, 1957-2 C.B. 913, superseded in part (after 1988 amendment to § 6511(a)) by Rev. Rul 66-118 contains another statement of interest. It concludes with the notation that, irrespective of the filing requirement of section 322(b)(1) of the 1939 Code and § 6511(a) of the 1954 Code, § 6511(b), and its predecessor, § 322(b)(2), limit the *amount* of any overpayment of tax which may be refunded even though the claim is timely filed under section 6511(a). This would appear to indicate that the IRS views § 6511(b), rather than § 6511(a), as the provision which ultimately protects the government against stale claims for refund.

> *(b) Limit on credit or refund.* Present law as one alternative provides that the amount of any credit or refund allowed cannot exceed the portion of the tax paid within a period of 3 years immediately preceding the filing of the claim. To correspond with the amendment described above, the House bill provides that in such cases the amount to be refunded or credited is not to exceed that portion of the tax which was paid within a period of 3 years preceding the filing of the claim plus the period of any extension of time for filing the return. Your committee has accepted this change.

S. Rep. No. 1983, 85th Cong. 2d Sess. (1958), *reprinted in* 1958 U.S.C.C.A.N. 4791, 4887.

Taxpayer respectfully submits that the legislative history unequivocally supports the conclusion that Congress intended that taxpayers have three years to file a return/claim for refund and that no different rule was intended to apply in the Tax Court. The committee reports evidence a consistent and continuing congressional intent that the rights of the Commissioner and taxpayers to reopen taxable years be correlative. It is logical to conclude that if Congress had perceived any other inconsistencies between limitations on assessments and refunds it would have eliminated such unfair advantage. The Tax Court's finding that the Service can shorten the time in which a taxpayer must file a claim for refund from three to two years is clearly at loggerheads with this expression of congressional intent.

IX. There Are Sound Policy Reasons for Affirming the Fourth Circuit.

The statutory language does not explicitly support the construction placed on it by the IRS. There are sound policy reasons for rejecting that construction.

A. Taxpayers Should Be Subject to the Same Statute of Limitation in the Tax Court as in the Other Refund Forums.

This Court has stated that "a desire for equality among taxpayers is to be attributed to Congress, rather than the reverse." *Colgate-*

Palmolive Peet Co. v. United States, 320 U.S. 422, 425 (1943). It is difficult to quarrel with this principle. The fundamentally disparate treatment meted out to Taxpayer, while within the power of Congress to dictate, should not be assumed. The loss of Taxpayer's refund, an unjust and harsh result suffered only because of the fortuity that he was mailed a Notice of Deficiency before he filed his return and only because he naively elected to respond to the invitation contained in that Notice to file a petition in the Tax Court, should only be countenanced upon a clear and *explicit* command in the statute.

The volume of precedent supporting the position of the IRS is misleading. As noted earlier, the precedent for the recent spate of Tax Court cases is found in two cases, *Berry v. Commissioner*, 97 T.C. 339 (1991) and *Galuska v. Commissioner*, 98 T.C. 661 (1992). Once *Galuska* and *Berry* were decided, the die was cast in the Tax Court. However, all of the Tax Court cases suffer from the same flaw that negates their value as precedent. The denial of a refund of taxpayer's overpayment in each was totally dependent on the acceptance, without analysis, of the "deemed claim" concept. The courts of appeals decisions, affirming the Tax Court, also erred, in large part because they were misled by the IRS.

The very attorneys who wrote the brief for the IRS in the Fourth Circuit told the Seventh Circuit that a decision for the IRS in *Galuska* would have no adverse affect on taxpayers such as Mr. Lundy, who filed their return within three years.

> Section 6512(b)(3)(B) provides, in effect, however, that no portion of any such overpayment determined by the Tax Court shall be refunded to the taxpayer to the extent the taxpayer would have been precluded under Section 6511(b)(2) from obtaining a refund had he filed suit in the District Court. Section 6512(b)(3)(B) thus seeks to place taxpayers who seek a refund of an overpayment in the Tax Court in the same position as if they had brought a refund suit in the district court.

Appellee's Brief at 5, *Galuska. v. Commissioner*, 5 F.3d 195 (7th Cir. 1993) (No. 92-3591). (L 43-44).

The Seventh Circuit obviously agreed with the IRS:

> In view of section 6512(b)(3), a taxpayer who asks the Tax Court for a refund of an overpayment is treated the same as if he had brought a refund suit in the district court, so that there is no advantage in choosing one forum over the other.

Galuska, 5 F.3d. at 196 n.1.

The Seventh Circuit, however, also accepted the IRS' contention that the mailing of the Notice of Deficiency constituted Galuska's "deemed claim" with the result that the two-year limitation period of § 6512(b)(2)(B) applied. *Id.* at 196. The Seventh Circuit was clearly unaware that it was being induced to write an opinion that would be subsequently cited as authority for the disparate treatment of Taxpayer sought here by the IRS.

Taxpayer in this case did file his return within three years and could have obtained a refund in the district court. If the IRS is held to its admission in its *Galuska* brief, Taxpayer should receive his refund.

In *Richards v. Commissioner*, 37 F.3d 587, 591 (10th Cir. 1994), the Tenth Circuit approved that part of the *Galuska* opinion that called for consistent treatment of taxpayers, regardless of forum. Yet, it also accepted, without analysis, the "deemed claim" notion and concluded that the two-year limitation period applied. While it did not matter which limitation period applied in *Galuska*, it very much mattered in *Richards*. Taxpayer's refund was forfeited. The Tenth Circuit confused questions of law and fact:

> We call attention to these portions of the Galuska opinion to emphasize what we perceive to be the fact-intensive nature of this analysis. While Mr. Galuska would not have gained an advantage in choosing federal district court as opposed to [T]ax [C]ourt, Ms. Richards case intimates a different conclusion. If Ms. Richards' claim had been brought in federal district court, we would have agreed with her position that the three-year refund period

> applied under [section] 6511(b)(2)(A) and the taxes she overpaid would have been refundable.
>
> Thus, while the facts of *Galuska* suggest "no advantage" to choosing a particular forum to litigate this issue, the facts of Ms. Richards' case suggest a contrary result.

Richards, 37 F.3d at 591.

The law does not change with the facts. The law is applied to the facts. If, as the IRS represented to the Seventh Circuit, § 6512(b)(3) seeks to place the taxpayer who petitions the Tax Court in the same position that he would be in had he filed a complaint in district court, the taxpayer in *Richards* should have received her refund.[14]

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[14] The Ninth Circuit's erroneous application of a two-year statute of limitations to all taxpayers in *Miller v. United States*, 38 F.3d 473 (9th Cir. 1994), is partly attributable to misplaced reliance on the decisions involving the statute of limitations applicable to Tax Court petitioners. The Ninth Circuit relied on the following language from *Galuska*, 5 F.3d at 196 n.1:

> In view of section 6512(b)(3), a taxpayer who asks the Tax Court for a refund of an overpayment is treated the same as if he had brought a refund suit in the district court, so that there is no advantage in choosing one forum over the other.

The clear thrust of the Seventh Circuit's statement is that a taxpayer who elects to litigate his liability in the Tax Court should receive no worse treatment in the Tax Court than he would in a district court. The Ninth Circuit, however, looked only at the last phrase of the quoted language. It reasoned that since there should be no advantage in choosing one forum over the other and since taxpayers in the Tax Court only have a two-year period in which to claim refunds, the rule should be the same in the district court. The Ninth Circuit obviously was unaware that, even under the IRS position, if a taxpayer filed his return more than two years late but before the issuance of the notice of deficiency "deemed claim" for refund he would have the benefit of the three-year limitation period. The Ninth Circuit was also apparently unaware that the Tax Court and the Tenth Circuit in *Richards v. Commissioner*, 37 F.3d 587, 591 (10th Cir. 1994), have acknowledged that their interpretation of section 6512(b)(3)(B) results in section 6511, the general statute of limitations, being applied *differently and more harshly* to taxpayers who elect to file a petition in the Tax Court than it is applied to taxpayers who file a refund suit

Taxpayer agrees with the IRS that there are some differences between tax litigation in the Tax Court and the district courts. (Pet. Br. 32). The fact is, that by incorporating § 6511 by reference into § 6512(b)(3)(B), Congress indicated that it wanted the *same* statute of limitations to apply in the Tax Court that applies in the other forums. An extreme punishment should not result from implying three unexpressed concepts into § 6512(b)(3)(B). As the Fourth Circuit observed: "[I]f there is such a rational reason [for different statutes of limitations], Congress certainly hasn't articulated it." (Pet. App. 17a). The IRS cites the highly respected treatise, Junghans & Becker, *Federal Tax Litigation* (2d ed. 1992) as authority for one of the differences between Tax Court and district court litigation. (Pet. Br. 32 n.13). The coverage in that treatise of the statute of limitations for claiming refunds is worthy of note: the Tax Court has refund jurisdiction "if the taxpayer could have timely filed a claim for refund on the mailing date of the notice of deficiency even though no claim was actually filed." *Junghans & Becker* at 4-25 (citing § 6512(b)(3)(B)).

B. The Harsh Result Sanctioned by the Tax Court Will Fall Mainly on Unsophisticated Taxpayers, Rather than More Affluent Taxpayers Who Can Afford to Retain Counsel and File a Refund Suit in a District Court or the Claims Court.

That Taxpayer would suffer the loss of his refund only if he elects to contest his tax liability in the Tax Court, as opposed to the other forums having refund jurisdiction, is all the more absurd if the reason for the establishment of the Tax Court is considered. The stated reason for its establishment was to "remove the hardship occasioned by an incorrect assessment" by allowing taxpayers to contest their tax liability without first paying the tax. S. Rep. No. 398, 68th Cong., 1st Sess 8 (1924). "[The taxpayer] is entitled to an

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in the district court. In other words, the Ninth Circuit was confused, but understandably so. It misunderstood decisions of sister circuits which were themselves in error and the net result, at least in the view of the Ninth Circuit, is a general two-year statute of limitations for filing claims for refunds in clear contravention of section 6511's grant of three years. In effect, the IRS, now apparently relying on *Miller*, is seeking to bootstrap the statute's three-year statute of limitations into a two-year statute of limitations for *all* late-filers.

appeal and to a determination of his liability for the tax prior to its payment." *Id.* We would have to ascribe perversity to Congress to believe that it established the Tax Court to facilitate taxpayers' ability to contest their tax liability and, at the same time, created a statutory scheme where a substantial number of those taxpayers expecting to benefit from Tax Court jurisdiction would have those expectations crushed. The Tax Court has also recognized that the element of fairness should be a significant factor in construing the scope of its refund jurisdiction. "Congress did not intend by section 6512(b) and its predecessors to expand this Court's jurisdiction to overpayments and, at the same time, create a situation where choice of this forum would provide such unfair results." *Estate of Baumgardner v. Commissioner*, 85 T.C. 445, 453 (1985).

The 1924 Senate Report also noted that the Tax Court was to "sit locally throughout the United States to enable taxpayers to argue their cases with as little inconvenience and expense as is practicable" and provided for a "flexible and informal procedure." S. Rep. No. 398, at 9. Many of the taxpayers whose wages are overwithheld and have overpaid their taxes either cannot afford counsel or the amount involved, as here, does not justify the expenditure. The IRS recognizes that the Tax Court is the only one of the three forums where a taxpayer can effectively appear pro se. In IRS Publication 5, *Appeal Right and Preparation of Protests for Unagreed Cases*, (L 28), the following statement appears:

> The [Tax] Court will schedule your case for trial at a location convenient to you. You may represent yourself before the Tax Court, or you may be represented by anyone permitted to practice before that Court.

There is no reference to self-representation in the section of Publication 556 that discusses appeals to the district courts and the Claims Court.

C. Taxpayers Would Be Forced to Pay the Assessed "Deficiency," Retain Counsel, and File Refund Suits in District Court or Forfeit Their Refunds.

Despite the fact that the IRS continues to communicate to the public that they have three years in which to file their refund claims,

eventually the truth will come out. Late-filing taxpayers with refunds due will be educated to shun the Tax Court. If they can afford to pay the box-car "deficiencies,"[15] which can be computed without credit for any taxes paid through withholding or deductions to which the taxpayer is entitled, they will flock to the district courts. Most will be forced to appear *pro se*, a task they are not equipped to perform, in courts not geared to serve them. Congress surely did not contemplate this scenario when it created the Tax Court and gave it refund jurisdiction.

D. The Code Should Not Be Construed in a Manner Which Results in an Arbitrary and Capricious Application of the Statute of Limitations.

Under the IRS construction of § 6512(b)(3)(B), the statute of limitations applies unevenly and capriciously to Tax Court petitioners.

The IRS chides those individuals, such as Taxpayer, who file their returns after two but before three years, (Pet. Br. 33), implying that their culpability justifies forfeiture of their refund. But if the IRS computer generates a Notice of Deficiency before the expiration of two years, the IRS admits that the taxpayer will receive his refund no matter how many years late the taxpayer files, or even if no return is *ever* filed. (Pet. Br. 33 n.15.) Another absurdity which results under the IRS construction is that the "deemed claim" only arises if the Notice of Deficiency is mailed before the return is filed. *Id.* As the Fourth Circuit stated: "There is no rational reason why the taxpayer should have a three-year refund period cut short simply because the IRS beat the taxpayer to the punch by mailing the Notice of Deficiency first. Congress certainly did not intend the length of

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[15] As the Fourth Circuit observed, in many cases it would be difficult for the taxpayer to pay the deficiency, and to force him to do so would be inconsistent with the purpose for the creation of the Tax Court to allow "the average taxpayer [to] challenge a notice of deficiency without first having to pay the deficient amount." (Pet. App. 10a n.7). The court observed that to obtain his refund [of $3,537], Taxpayer would have had to pay almost $14,000. (Pet.App. 10a n.7). Of course, this does not take into account the additional cost of retaining counsel in order to proceed effectively in the district court.

the refund period to turn on such an arbitrary distinction." (Pet. App. 18a-19a).

The anomalies generated by the IRS construction can be illustrated: Assume that taxpayers A and B have each overpaid their taxes and neither has filed a return for 1990. The due date of their returns and the date their taxes are deemed paid is April 15, 1991. If, as a result of fortuity, an IRS computer generates a Notice of Deficiency to A on April 13, 1993 and to B on April 17, 1993, A gets his refund but B does not. A's "deemed claim" will have complied with the 2-year limitation of § 6511(b)(2)(B) but B's "deemed claim" would not. The divergent treatment afforded to A and B cannot be justified rationally. Moreover, it creates an incentive for the IRS to lay in the weeds and issue Notices of Deficiency to non-filers immediately after the expiration of two years and hope that those taxpayers file a petition in the Tax Court. In this regard, the Fourth Circuit criticized a situation where the taxpayer suffers because the IRS delays the mailing of the Notice of Deficiency. (Pet. App. 17a-19a). If the goal of the IRS is to make sure that none of the non-filers get refunds, there is a simple solution: wait three years and one day from the date the taxes were paid to mail the Notice of Deficiency. If a taxpayer has still not filed a return by that date he would not be entitled to a refund under any theory.

Assume the same facts, described above, except that A files his return reporting an overpayment on July 1, 1993, Notices of Deficiency are mailed to each on July 15, 1993, and B files his return reporting an overpayment on July 30, 1993. Since A filed his return before the Notice was issued, the three-year limitation period of § 6511(b)(2)(A) applies, and he obtains his refund. As to B, since no return was filed prior to the "deemed claim" for refund, the 2-year limitation would apply and his refund would be confiscated.

The effect of the IRS position is that with respect to a taxpayer who has not as yet filed a return there are 365 possible statutes of limitations (the date the Notice of Deficiency is mailed). For example, a Persian Gulf veteran was subject to an effective statute of limitations of 2 years, 10 months, 30 days, *Hathaway v. Commissioner*, 66 T.C.M. (CCH) 1101 (1993), while another taxpayer was subject to an effective statute of limitations of 2 years,

13 days, *Sumiel v. Commissioner*, 65 T.C.M. (CCH) 2142 (199
(L 47).

Congress could not possibly have intended such ridiculous disparities when it enacted § 6512(b)(3)(B) and the statute should not be so construed. Under the IRS' construction, the application of the limitation period has no consistent relationship to the conduct or culpability of the taxpayer.

The IRS stated to the Fourth Circuit that this fickle application of the tax laws is beside the point and could be avoided by filing a return within two years of the due date. Appellee's Brief at 28-29, *Lundy* (No. 94-1260). This totally capricious and/or arbitrary application of the statute is not "beside the point." A statute should be not be construed in such a manner so as to produce absurd results. *Haggar v. Helvering*, 308 U.S. 389, 394 (1940). The IRS statement that the three-year statute of limitations can only be preserved by filing a claim for refund within two years speaks for itself.

X. There Is No Policy Support for the Construction of the Statute Offered by the IRS.

The construction of the IRS serves "...no administrative or governmental convenience or purpose apart from compliance with the supposed command of the statute." *Haggar Co. v. Helvering*, 308 U.S. 398. What "governmental convenience" results from having 365 statutes of limitation in the Tax Court? Were the IRS to have the misfortune of winning this case, it would have to change its revenue rulings, change publications addressed to taxpayers, reprogram its computers that generate checks on claims for refund, and conduct a publicity campaign to reverse the understanding by the financial press that taxpayers have three years. The refunds confiscated from unsuspecting taxpayers would be offset by the expense of changing and publicizing its refund procedures.

Every time the IRS has offered a policy reason in support of its position, it opens its position to ridicule. In the proceedings below, the IRS made representations which could have but did not mislead the Fourth Circuit: (1) The IRS incorrectly stated that "[i]f Section 6512(b)(3)(B) did not deem that a claim for refund had been filed, then any refund would be barred [by § 7422] to a taxpayer, such as

taxpayer herein, who, in fact, has not filed a claim for refund." (IRS Supp. Br. 2) This is nonsense. (2) The IRS advanced *Miller* to support the proposition that there was no unfairness to taxpayers who petition the Tax Court because the rule in the district courts was two years. The IRS did not inform the Fourth Circuit that it had confessed error to the Ninth Circuit. (3) The IRS employed *Galuska* as authority for the two-year statute of limitations but did not reveal that its brief to the Seventh Circuit represented that § 6512(b)(3)(B) simply put a Tax Court petitioner in the same shoes as a taxpayer in the district court.

Equally ludicrous is its statement to this Court: "It should not be forgotten that the solution to respondent's predicament was within his own grasp." (Pet. Br. 33). Had the IRS not lulled Taxpayer into a false sense of security by issuing refunds to him in past years when he filed more than two years late; had the IRS not withheld from Taxpayer the change in its litigating posture when he wrote them and told them that he planned to file within three years; had the IRS not communicated to the public in every publication available to laypeople that taxpayers have three years to file refund claims; had the IRS not delayed mailing its Notice of Deficiency until two years had elapsed from the due date; had the IRS not sent Taxpayer a menacing Notice of Deficiency and omitted the important information that if he filed a petition in the Tax Court he would forfeit his refund, Taxpayer would not be in the predicament of having to take his case all the way to the Supreme Court to obtain a refund of his admitted overpayment. As the Fourth Circuit said: "[I]t is completely unfair to deny a taxpayer his refund simply because the IRS failed to act quickly enough. Congress certainly did not intend for the taxpayer's ability to collect a refund in the Tax Court to turn on when the IRS mailed its Notice of Deficiency." (Pet. App. 19a).

CONCLUSION

The judgment of the Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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No. 94-1785

In the Supreme Court of the United States

OCTOBER TERM, 1995

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ROBERT F. LUNDY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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When a taxpayer petitions the Tax Court for review of a deficiency asserted by the Commissioner, Section 6512(b)(1) of the Internal Revenue Code authorizes the Tax Court not only to review the claimed deficiency but also to determine the amount of any overpayment that the taxpayer may have made. 26 U.S.C. 6512(b)(1). Section 6512(b)(3)(B), however, limits the amount of any refund of an overpayment to the amount that would have been refundable under Section 6511(b)(2) if a claim for refund had been filed by the taxpayer "on the date of the mailing of the notice of deficiency" (26 U.S.C. 6512(b)(3)(B)). Section 6511(b)(2)—which Section 6512(b)(3)(B) incorporates by reference—limits the amount of any refund to the amount of the disputed taxes that the taxpayer paid (i) within the two-year

period prior to the date of the refund claim if, at the time of the refund claim, "no return was filed by the taxpayer" (26 U.S.C. 6511(a), incorporated by reference in 26 U.S.C. 6511(b)(2)(B)) or (ii) within the three-year period prior to the date of the refund claim if the refund claim was made "within 3 years from the time the return was filed" (26 U.S.C. 6511(a), incorporated by reference in 26 U.S.C. 6511(b)(2)(A)).

In the present case, respondent had failed to file any return for 1987 by the time the notice of deficiency was mailed by the Commissioner in 1990. Accordingly, on the date that the notice of deficiency was issued and the statutorily imputed refund claim arose under Section 6512(b)(3)(B), "no return was filed by the taxpayer" (26 U.S.C. 6511(a)). As the result, the refund that respondent may obtain is limited to the amount of tax that he paid during the two-year period immediately preceding the imputed refund claim. 26 U.S.C. 6511(b)(2)(B). Because no portion of the tax in issue was paid within the two-year period preceding the mailing of the notice of deficiency, respondent was barred from obtaining any refund of his overpayment. See, *e.g.*, *Richards* v. *Commissioner*, 37 F.3d 587, 589 (10th Cir. 1994), petition for cert. pending, No. 94-1537; *Galuska* v. *Commissioner*, 5 F.3d 195, 196 (7th Cir. 1993); *Kartrude* v. *Commissioner*, 925 F.2d 1379, 1385 (11th Cir. 1991); cases cited Pet. Br. 22.

For the reasons set forth in detail in our opening brief, the contrary conclusion of the court of appeals in this case disregards the text of the statute and misinterprets its history. Indeed, neither respondent nor the *amicus curiae* directly attempts to defend the reasoning of the court of appeals. Instead, they offer

a variety of alternative rationales, none of which withstands scrutiny.

1. The two principal arguments advanced by respondent were not addressed by the court of appeals.

a. Respondent offers, as his first alternative argument (see Resp. Br. 16 n.6), the suggestion that Section 6512 does not control the determination of the limitations on his refund in Tax Court. He notes that, after the notice of deficiency was issued in September 1990, he filed a belated return with a refund claim in December 1990. He further notes (Resp. Br. 14-15) that the belated return was filed within three years of its lawful due date (April 1988) and asserts that the associated refund claim would therefore trigger the three-year refund period that he claims would be applicable in federal district court under Section 6511(b)(2)(A).

The question whether, on these facts, respondent *could* have brought a refund suit in federal district court is obviously not presented in this case. That question, on which courts have reached different conclusions, involves different statutory language than the question presented in this case. See Pet. Br. 29-30. The present case arose in Tax Court, not in district court. For Tax Court cases, Congress fashioned statutory language in Section 6512 that incorporates some of the provisions of Section 6511 but tailors them to the specifics of Tax Court litigation.

The events that bear on the determination of the refund period in Tax Court cases are specifically set forth in Section 6512(b)(3). Under that Section, the refund period is to be determined as if a refund claim had been filed "on the date of the mailing of the notice of deficiency" (26 U.S.C. 6512(b)(3)(B)) unless a refund claim had *actually* been filed "*before*

the date of the mailing of the notice of deficiency" (26 U.S.C. 6512(b)(3)(C) (emphasis added)). The statute does not provide, as respondent suggests, any additional jurisdiction in Tax Court for refund claims made "after" the notice of deficiency is issued.

Respondent's contention that a *subsequent* refund claim expands the refund period in Tax Court proceedings thus simply ignores, and departs from, the plain text of the applicable statute. The Tax Court is a court of limited jurisdiction (*Commissioner* v. *McCoy*, 484 U.S. 3, 7 (1987) and the limitations that Congress has imposed on that court's jurisdiction to award recoveries against the government "must be strictly adhered to by the judiciary" (*Kavanagh* v. *Noble*, 332 U.S. 535, 539 (1947)).

b. Turning to the text of the applicable statute, respondent asserts that if Section 6512 were amended only slightly it could be read to permit his recovery in this suit. Disregarding the actual text of the statute, respondent asserts (Resp. Br. 16-21) that the statute does not—as its language states—direct the Tax Court to assume that "on the date of the mailing of the notice of deficiency a [refund] claim had been filed" by the taxpayer (26 U.S.C. 6512(b)(3)(B)) and to then determine, based on that assumption, the amount of the taxpayer's overpayment that would be refundable under Section 6511(b)(2). Instead, respondent claims that Section 6512(b)(3)(B) should be read to direct the Tax Court to make a determination as to whether the taxpayer "could have filed a claim for refund" on the date the notice of deficiency was mailed (Resp. Br. 17). If the taxpayer "could have filed" a timely refund claim on that date, respondent contends, then the taxpayer should be allowed to recover the amount

of any tax overpayment that was paid within the three-year period immediately preceding the issuance of the notice of deficiency (Resp. Br. 16 & n.6).[1]

Respondent's "could have filed" construction of Section 6512(b)(3)(B) suffers from the obvious flaw that it deviates from the actual language of that provision. Section 6512(b)(3)(B) states that no refund shall be allowed for any overpayment of tax except to the extent that the Tax Court determines that it was paid (26 U.S.C. 6512(b)(3)(B) (emphasis added)):

> within the period which would be applicable under section 6511(b)(2) * * *, if on the date of the mailing of the notice of deficiency a claim *had been filed (whether or not filed)* * * *.

As the courts of appeals and the Tax Court had consistently held prior to the decision in this case, the language of Section 6512(b)(3)(B) directs the Tax Court to treat the taxpayer as if he had filed a claim for refund on the date the notice of deficiency was mailed and then to apply the limitations provisions of Section 6511(b)(2) to that imputed claim for refund.

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[1] That contention is undergirded by the assertion that a return and refund claim filed more than two years after the tax is paid would be effective to invoke the three-year limitations period in a district court refund suit under Section 6511(a). That assertion was squarely rejected by the Ninth Circuit in *Miller* v. *United States*, 38 F.3d 473, 476 (1994). See also *Oropallo* v. *United States*, 994 F.2d 25, 30 (1st Cir. 1993) ("We have assumed [for the sake of argument] that a return can be filed at any time after its due date and still be a return for purposes of filing a claim within that three-year period. Under that interpretation, the limitations period in section 6511(a) is totally illusory."), cert. denied, 114 S. Ct. 705 (1994). See Pet. Br. 29-30 & nn.11, 12.

Because "no return was filed by the taxpayer" (26 U.S.C. 6511(a)) before the notice of deficiency was issued by the Commissioner, respondent may recover only that portion of the overpayment that he paid within the two-year period preceding the notice (26 U.S.C. 6512(b)(3)(B), incorporating 26 U.S.C. 6511(b)(2)(B)). See, *e.g.*, *Richards* v. *Commissioner*, 37 F.3d at 589; *Galuska* v. *Commissioner*, 5 F.3d at 196.

Respondent's proposed reconstruction of Section 6512(b)(3)(B) has no connection to the actual language of that provision. The principal substantive difference between the text of the statute and respondent's proposed revision is that, under respondent's view, the requirement that taxpayers submit income tax returns would become irrelevant. Under the statute, a refund claim is not effective to invoke the three-year limitations period unless it is filed with or following a return. *Richards* v. *Commissioner*, 37 F.3d at 589. A refund claim that is filed before the return is filed is

> not filed "within 3 years *from the time* the return was filed." 26 U.S.C. § 6511(a) (emphasis added). The ordinary understanding of the words "from the time" implies that the taxpayer must file the return *prior to* filing the claim in order to benefit from the three-year refund period.

Richards v. *Commissioner*, 37 F.3d at 589. Accord, *Galuska* v. *Commissioner*, 5 F.3d at 196; *Anderson* v. *Commissioner*, 74 A.F.T.R.2d ¶ 94-6222, 94-6223 (4th Cir. 1994); *Kartrude* v. *Commissioner*, 925 F.2d at 1385; *Allen* v. *Commissioner*, 99 T.C. 475, 479 (1992), aff'd, 23 F.3d 406 (6th Cir. 1994).

Under respondent's view, however, the requirement of Section 6511(a) that an income tax return be filed before the refund claim is filed (to invoke the three-year period of limitations) would become irrelevant because respondent "could have filed" his return at any time, even several years after it was due.[2] By making it irrelevant whether or not a return actually has been filed as of the date the notice of deficiency is issued, respondent's proposed reconstruction of the statute would result in a blanket allowance of a three-year period of limitations for refund claims in Tax Court.[3] It is obvious, however, that Congress did

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[2] See note 1, *supra*. Even though an additional tax obligation may accrue from the failure to file a timely return (see 26 U.S.C. 6651(a)), a belated income tax return may be filed by any taxpayer at any time. In this case, respondent's return was due on April 15, 1988. The late filing of that return (in December 1990) could have exposed respondent to additional tax obligations; but the fact that the return was untimely does not mean that it could not be submitted late.

[3] The various legislative reports that respondent cites in support of this proposition (Resp. Br. 18-21) provide no basis for flouting the direct command of the plain language of Section 6512(b)(3)(B). See Pet. Br. 23-26. In particular, the 1962 amendment that respondent cites added a provision to the statute that expressly authorizes refunds in Tax Court cases in which the taxpayer had filed a refund claim "*before* the date of the mailing of the notice of deficiency" (26 U.S.C. 6512(b)(3)(C) (emphasis added)). Respondent states that this amendment "is not pertinent to the issue here" (Resp. Br. 21) but asserts that its legislative history is.

The Senate Report to the 1962 amendment states that the statute as amended permits refunds in Tax Court "where valid claims have been timely filed, as well as where these claims could have been filed on the date of the mailing of the notice of deficiency." S. Rep. No. 2273, 87th Cong., 2d Sess. 15 (1962). Respondent asserts that this Report supports the

not intend to adopt an automatic three-year period of limitations for refund claims asserted in Tax Court proceedings. Instead, Congress specified that if "no return was filed" as of the date of the issuance of the notice of deficiency, only a two-year period of limitations applies. 26 U.S.C. 6511(a), incorporated by reference in 26 U.S.C. 6511(b)(2)(B), incorporated by reference in 26 U.S.C. 6512(b)(3)(B). By ignoring the language that Congress enacted, respondent's contention deprives the intricate distinctions that Congress drew in enacting Sections 6511 and 6512 of any meaning.

2. The central tenet of respondent's position is the theory that Congress intended a taxpayer in all circumstances to be able to obtain a refund of any overpayment of tax made within the 3-year period immediately preceding the date of filing his claim for refund. That contention contradicts the actual terms of the limitations on refunds of tax overpayments imposed by Congress in Sections 6511 and 6512 of the Code.

a. Section 6511(a) provides that a claim for refund "*of any tax imposed by this title in respect of which tax the taxpayer is required to file a return* shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time

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view that Section 6512 broadly permits a three-year refund period whenever a valid claim "could have been filed on the date of the mailing of the notice of deficiency." What respondent ignores in making that contention, however, is that a "valid claim" may give rise to only a two-year refund period, rather than a three-year refund period. Under Section 6511(a), a valid claim gives rise to only a two-year refund period if, when the claim is filed, "no return was filed" (*ibid.*). That is the situation that exists in this case.

the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid." 26 U.S.C. 6511(a) (emphasis added). When the taxpayer has not filed his return at the time that he files his refund claim, the refund claim is timely only if it is filed within two years of the date that the tax was paid. *Ibid.* Under the corresponding provisions of Section 6511(b)(2)(B), which Section 6512(b)(3)(B) incorporates by reference, a taxpayer who files a claim for refund without filing a tax return is therefore limited to recovering only that portion of the tax overpayment that was paid within the two-year period preceding the filing of the claim for refund.

Since respondent had not filed his return as of the imputed filing date of his claim for refund under Section 6512(b)(3)(B) (the date the notice of deficiency was mailed),[4] respondent was limited by Section 6511(b)(2)(B) to recovering the portion of his

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[4] Respondent chides the Commissioner for using the phrase "imputed refund claim" to describe the operation of Section 6512(b)(3)(B). Contrary to respondent's statement (Resp. Br. 23-24), the Commissioner does not assert that a notice of deficiency is equivalent to a claim for refund. Instead, under the specific text of Section 6512(b)(3)(B), the mailing of the notice of deficiency simply establishes the date that the Tax Court is to assume as a matter of law that a refund claim was filed (even though one was not filed) for purposes of applying the limitations provisions of Section 6511. See, *e.g.*, *Richards* v. *Commissioner*, 65 T.C.M. (CCH) 2137, 2138 (1993) (Section 6512(b)(3)(B) "tests the applicable limitations period of section 6511 against a hypothetical claim for refund filed on the date the notice of deficiency was mailed"), aff'd, 37 F.3d 587 (10th Cir. 1994), petition for cert. pending, No. 94-1537.

overpayment that was paid within the two-year period preceding the date of his imputed refund claim. Because it is undisputed that no portion of respondent's tax overpayment was paid within the two-year period preceding the filing date of his imputed claim for refund (Pet. App. 2a), the Tax Court correctly held that it lacked jurisdiction to award a refund in this case.

b. In an effort to avoid the mandate of Sections 6511 and 6512, respondent (Resp. Br. 13-14) and the *amicus curiae* (Am. Br. 16-22) assert that the second clause of the first sentence of Section 6511(a)—which states that "if no return was filed by the taxpayer" the claim for refund must be filed "within 2 years from the time the tax was paid"—applies only to taxes for which no return is *required* to be filed. Under that theory, the two-year period under the statute would have no application to refund claims for income, estate, gift or other taxes for which a return is required to be filed.

That implausible assertion has no support in the case law. The short answer to respondent's argument is that Section 6511(a) states that if no return *was* filed by the taxpayer he must file his claim for refund within two years from the time the tax was paid. The statute does not state that if no return was *required* to be filed by the taxpayer, then only a two-year filing period for the taxpayer's refund claim is allowed. Moreover, the clause "if no return was filed" is part of the first sentence of Section 6511(a), which, by its express terms, applies to any "[c]laim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return." 26 U.S.C. 6511(a). By contrast, the *second* sentence of Section 6511(a)

applies to any "[c]laim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp"—for which no return is required under the Code—and provides that such claims must be filed within *three years* from the time the tax was paid. *Ibid.* The *first* sentence of Section 6511(a) thus necessarily applies, as its language states, to any claim for refund of tax where a taxpayer "is required to file a return" but has failed to do so as of the time the claim for refund is filed. 26 U.S.C. 6511(a).[5] Because "no return was

[5] This construction of Section 6511 is confirmed by Treasury Regulation § 301.6511(a)-1, which was promulgated by the Secretary of the Treasury in 1956 (T.D. 6172, 1956-1 C.B. 565, 567-568, 578). The regulation provides (26 C.F.R. 301.6511(a)-1 (emphasis added)):

> (a) *In the case of any tax (other than a tax payable by stamp)*:
>
> (1) If a return is filed, a claim for credit or refund of an overpayment must be filed by the taxpayer within 3 years from the time the return was filed or within 2 years from the time the tax was paid, whichever of such periods expires the later.
>
> (2) If no return is filed, the claim for credit or refund of an overpayment must be filed by the taxpayer within 2 years from the time the tax was paid.
>
> (b) *In the case of any tax payable by means of a stamp*, a claim for credit or refund of an overpayment of such tax must be filed by the taxpayer within 3 years from the time the tax was paid. For provisions relating to redemption of unused stamps, see section 6805.

This long-standing regulation is a reasonable interpretation of the statute that is consistent with its terms. Under the regulation, respondent's assertion that the second clause of the first sentence of Section 6511(a) applies only to taxes in respect of which a return was *not* required to be filed must be rejected. See *National Muffler Dealers Ass'n* v. *United*

filed by" respondent as of the time of the mailing of the notice of deficiency, he was barred by Section 6512(b)(3)(B) from recovering any portion of his tax overpayment that was paid more than two years before that date. *Galuska* v. *Commissioner*, 5 F.3d at 196 & n.2. See also *Miller* v. *United States*, 38 F.3d at 475.

3. a. The *amicus curiae* does not dispute that, under Section 6512(b)(3)(B), the refund period in Tax Court cases is to be calculated as if respondent had filed a claim for refund "on the date of the mailing of the notice of deficiency" (26 U.S.C. 6512(b)(3)(B)). The *amicus* maintains, however, that it should also be assumed that the taxpayer filed a tax return on that same date reporting an overpayment of the tax.[6] The *amicus* asserts that, if both the return and the refund claim were assumed to have been filed on the same date, the three-year period of limitations under Section 6511(a) would then apply (Am. Br. 1-24). But see note 1, *supra*.

The contention that a hypothetical tax return should be assumed to have been filed on the date that the notice of deficiency was mailed is inconsistent with both the text and the logic of the statute. The statute directs the Tax Court to determine the amount of the overpayment that would be refundable under Section 6511(b)(2) if it were assumed that the taxpayer had filed a "claim for refund" on the date the

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States, 440 U.S. 472, 476 (1979) (quoting *United States* v. *Cartwright*, 411 U.S. 546, 550 (1973)) (Treasury regulations, "if found to 'implement the congressional mandate in some reasonable manner,' must be upheld").

[6] Respondent advances the same contention as an alternative to his principal assertions. See Resp. Br. 26-29.

notice of deficiency was mailed. 26 U.S.C. 6512(b)(3)(B). The statute does not provide, as respondent and the *amicus* suggest, that the Tax Court is to determine the amount refundable under the applicable subparagraphs of Section 6511(b)(2) on the assumption that the taxpayer filed *both* a return *and* a refund claim on the date of the mailing of the notice of deficiency.

Respondent claims that, if a taxpayer were deemed under Section 6512(b)(3)(B) to have filed his tax return on the date the notice of deficiency was mailed, as well as deemed to have filed his claim for refund on that date, the taxpayer would then be entitled under Section 6512(b)(3)(B) to obtain a refund of the amount of his overpayment that was paid within the three-year period immediately preceding the mailing date of the notice of deficiency. But see note 1, *supra*. If Congress had intended to adopt such a flat three-year rule, however, it would have specified in Section 6512(b)(3)(B) that the Tax Court is authorized to determine an overpayment with respect to all amounts paid within the three-year period preceding the issuance of the notice of deficiency. Instead, by directing the Tax Court to determine the amount of the overpayment that would be refundable under the applicable subparagraph of Section 6511(b)(2) on the assumption that the taxpayer had filed a "claim for refund" on the date the notice of deficiency was mailed, Congress expressly incorporated the separate two-year and three-year limitations periods of Section 6511(b)(2). See 26 U.S.C. 6512(b)(3)(B). By adopting both limitations periods, Congress manifestly did not intend that *all* taxpayers invoking the Tax Court's jurisdiction would be entitled to the three-year period of limitations on overpayments.

The courts of appeals have recognized that the language of Section 6512(b)(3)(B) can not be construed in the manner urged by respondent and the *amicus curiae*. "When the Tax Court determines whether an overpayment is refundable under Section 6512(b)(3)(B), the Internal Revenue Code does not empower the Tax Court to treat a taxpayer like Galuska who has not filed a return as of the date the deficiency notice was mailed as if he had filed a return by that date." *Galuska* v. *Commissioner*, 5 F.3d at 197. See also *Anderson* v. *Commissioner*, 74 A.F.T.R.2d at 94-6224 ("Although the Andersons are treated as if they had filed a claim on the date the deficiency notice was mailed, 26 U.S.C. Section 6512(b)(3), they are not also treated as having filed a return on that date.").

b. As the *amicus curiae* points out (Am. Br. 9), a claim for refund of income taxes is, "[i]n general," to be "made on the appropriate income tax return." 26 C.F.R. 301.6402-3(a)(1). It does not follow, however, as *amicus* contends, that a claim for refund and a tax return are synonymous documents. It has "long been accepted" that a claim for refund need not be submitted on a return and that "[t]here are no rigid guidelines" governing the content of a claim for refund except that it "must have a written component and 'should adequately apprise the Internal Revenue Service that a refund is sought and for certain years.'" *Arch Engineering Co.* v. *United States*, 783 F.2d 190, 192 (Fed. Cir. 1986), quoting *American Radiator & Standard Sanitary Corp.* v. *United States*, 318 F.2d 915, 920 (Ct. Cl. 1963). See also *Estate of Hale* v. *United States*, 876 F.2d 1258, 1261-1262 (6th Cir. 1989); *Furst* v. *United States*, 678 F.2d 147, 151 (Ct. Cl. 1982); M. Saltzman, *IRS Practice*

and Procedure ¶ 11.08[2,] 11-60 (2d ed. 1991). The following documents have been held sufficient to constitute a "claim for refund" under Section 6511(a) of the Code (*id.* at 11-62 (citing cases; footnotes omitted)):

> a notation on the back of a check paying the tax, a written protest prior to or accompanying a payment of a tax (even where contingent on the occurrence of a future event), a letter attached to a return protesting the constitutionality of an imposed tax, a letter attached to a waiver of restrictions on assessment, and a letter agreeing to payment of tax in installments.

The fact that a "claim for refund" is not the equivalent of, or a necessary component of, a tax return is demonstrated by the text of the very statutes that this case involves. Section 6511(a) clearly establishes that Congress understands that claims for refund and tax returns are discrete, not interchangeable, documents.[7] Section 6511(a) provides that a "[c]laim for credit or refund of an overpayment" is to be filed (26 U.S.C. 6511(a) (emphasis added)):

> within 3 years from the time *the return was filed* or 2 years from the time the tax was paid, whichever of such periods expires the later, or if *no*

[7] Other provisions of the Internal Revenue Code similarly reflect that tax returns are distinct from claims for refund. Compare 26 U.S.C. 6012 (persons required to make returns of income), 26 U.S.C. 6651 (imposing an addition to tax for failure to file required returns), and 26 U.S.C. 6501(a) (imposing, in general, a three-year statute of limitations on assessment from the time the return was filed), with 26 U.S.C. 6511 (imposing time limits for filing a claim for refund and limiting amount of refunds based on when the claim was filed) and 26 U.S.C. 7422 (precluding the filing of a suit for refund unless a timely claim for refund previously has been filed).

return was filed by the taxpayer, within 2 years from the time the tax was paid.

The statutory limitations period for filing a claim for refund is thus specifically based on when, and whether, the *separate* event of the filing of the taxpayer's return occurred. As the Fourth and Seventh Circuits have held, when Congress directed the Tax Court in Section 6512(b)(3)(B) to determine the limitations period for refunds under the applicable provisions of Section 6511(b)(2) on the assumption that the taxpayer filed a "claim for refund" on the date the notice of deficiency was mailed, it plainly did not intend the Tax Court to make the further assumption that the taxpayer filed his return at the same time. *Galuska* v. *Commissioner*, 5 F.3d at 197; *Anderson* v. *Commissioner*, 74 A.F.T.R.2d at 94-6224.[8]

4. a. Respondent has filed numerous materials with this Court in the form of a lodging. None of these materials were submitted as evidentiary materials in the Tax Court and they do not form part of the formal record of this case. Some of the materials were appended to respondent's brief in the court of appeals; some of them post-date the briefing in the

[8] "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983), quoting *United States* v. *Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972). See also *Arizona Elec. Power Co-op, Inc.* v. *United States*, 816 F.2d 1366, 1375 (9th Cir. 1987) ("When Congress includes a specific term in one section of a statute but omits it in another section of the same Act, it should not be implied where it is excluded.").

court of appeals and have simply been lodged by respondent with this Court in the first instance.

The materials in the lodging purport to describe generic pronouncements of the Commissioner's concern that late-filed returns often preclude taxpayers from obtaining refunds to which they would otherwise be entitled. Those generic pronouncements obviously have no relevance to resolution of the legal question of the proper scope of the Tax Court's jurisdiction under the statutes that govern this case.

b. Respondent incorrectly asserts (Resp. Br. 32) that the long-standing interpretation of Section 6512(b)(3)(B) that the Tax Court described in this case, and that numerous courts of appeals have adopted, reflects only a recent analysis that departs from administrative practice. In particular, respondent erroneously claims that "the IRS changed its administrative practice sometime around 1991" (Resp. Br. 32).

As we describe in our opening brief, for at least twenty years the Internal Revenue Service—like the Tax Court and five of the courts of appeals—has consistently interpreted Section 6512(b)(3)(B) to limit Tax Court refunds in cases of this type to the amount of taxes paid within the two-year period preceding the notice of deficiency (Pet. Br. 27-28, citing cases; see also Pet. Br. 27 n.9). For example, in *White* v. *Commissioner*, 72 T.C. 1126, 1[illegible] (1979), the Tax Court agreed with the Commissioner that the two-year period of limitations applies under Section 6512(b)(3)(B) when the taxpayer had failed to file a valid return before the notice of deficiency was issued. The court of appeals acknowledged in this case that numerous Tax Court decisions reach the same conclusion (Pet. App. 20a & n.11), and respondent fur-

ther acknowledges that this understanding of Section 6512(b)(3)(B) had long been "suggested" in the case law (Resp. Br. 9).

Nothing in the lodged materials supports a conclusion that any different administrative practice has existed. Moreover, this case involves the question of the proper scope of the statutory jurisdiction of the Tax Court to award refunds of overpayments. If any administrative practice were thought relevant to that determination, it would presumably be the practice of the Tax Court, not the practice of the Internal Revenue Service. And respondent correctly acknowledges (Resp. Br. 9) that the Tax Court has consistently held that recoveries of overpayments are not available in the context of this case.

5. In enacting generic statutes of limitations, Congress is responding principally to the facts that it anticipates will arise in typical cases. In the typical tax case, the taxpayer will file a timely return and the government will issue a notice of deficiency close to the end of the third year after the return was filed. In that typical case, Section 6512(b)(3)(B) operates to permit the taxpayer to claim an overpayment and refund in his petition to the Tax Court even though the 90-day period for filing his petition under 26 U.S.C. 6213(a) would extend beyond the three-year period from the filing of his return.

When the taxpayer has failed to file a timely return, however, the Tax Court has no jurisdiction to award an overpayment made more than two years before the notice of deficiency is issued. See, *e.g.*, *Galuska* v. *Commissioner*, 5 F.3d at 196. It is thus the failure of respondent to file a timely return, and not any administrative action or inaction of the Commissioner, that resulted in the statutory bar against

respondent's refund claim in Tax Court under Section 6512(b)(3)(B). Respondent disagrees that this legislative determination expresses good public policy (Resp. Br. 41-43). But the determination of good public policy is unquestionably reserved to the legislature (*New Jersey* v. *Anderson*, 203 U.S. 483, 490 (1906)):

> [C]onsiderations of this character, however, properly addressed to the legislative branch of the government, can have no place in influencing judicial determination. It is the province of the court to enforce, not to make the laws, and if the law works inequality the redress, if any, must be had from Congress.

See also *United States* v. *Calamaro*, 354 U.S. 351, 357 (1957).

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

SEPTEMBER 1995

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No. 94-1785

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1994

Commissioner of Internal Revenue
Petitioner,

vs.

Robert F. Lundy
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT, ROBERT F. LUNDY

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INTRODUCTION

This brief is filed, pursuant to Supreme Court Rule 37, by *amicus curiae* in support of the Respondent, Robert F. Lundy. For the Court's information, your amicus is counsel of record for petitioners in *Richards v. Commissioner*, 37 F.3d 587 (10th Cir. 1994), petition for cert. pending, No. 94-1537, and *Rossman v. Commissioner*, 46 F.3d 1144 (9th Cir. 1995), petition for cert. pending, No. 94-1747. In addition to these two pending cases, your amicus was counsel of record for the taxpayers in *Galuska v. Commissioner*, 5 F.3d 197 (7th Cir. 1993) and *Anderson v. Commissioner*, 36 F.3d 1091 (4th Cir. 1994) (unpub), and filed a brief as *amicus curie* in support of the taxpayer in *Davison v. Commissioner*, 9 F.3d 1538 (2d Cir. 1993) (unpub).

Your amicus respectfully submits the following brief in the hope that it may be of assistance to the Court in its deliberations of this case.

ARGUMENT

I. IF THE TAXPAYER (LUNDY) HAD FILED A CLAIM FOR REFUND ON THE DATE THE NOTICE OF DEFICIENCY WAS MAILED TO HIM, HE WOULD HAVE BEEN ENTITLED TO REFUND OF THE DISPUTED TAX OVERPAYMENT.

The dispute in this case is very narrow, and boils down to the following question:

> To how much of a refund would Lundy have been entitled if he had filed a claim for refund on the date the IRS mailed the notice of deficiency?

This is the ultimate question resulting from the interplay of sections 6512(b)(3)(B) and 6511(b)(2). The applicable subsection of section 6511(b)(2) is then determined *solely* by reference to the

time a claim could have been filed. [1] The extent to which Lundy would have been entitled to a refund if he had filed a claim on the subject date will, in turn, depend on whether such a "claim" would have been filed "within the 3-year period prescribed in [section 6511(a)]." The exclusive focus is, therefore, what would have been the result if Lundy had filed a claim for refund on the notice of deficiency date (hereinafter "notice date").

The Internal Revenue Service has provided a ready answer to this question. In Revenue Ruling 76-511, 1976-2 C.B. 428, the IRS ruled that a claim filed on a late return is filed within the 3-year period prescribed by section 6511(a), and that all taxes paid within the preceding three years are refundable, pursuant to section 6511(b)(2)(A). The interpretation announced in the Ruling is plainly reasonable. Like the taxpayer in the Ruling, if Lundy had filed a refund claim on the notice date, he would have

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[1] The circuit court's analysis and rejection of the "deemed filed" claim is correct. Section 6512(b)(3)(B) refers to a situation as it would be "if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) * * *." The conditional "if" subsumes and takes into account the circumstance where a claim *has not* been filed. Treating a claim that has not been filed as if it actually were filed contradicts the statute. As the circuit court correctly noted, Congress knows how to use the term "deemed" when that is intended; the word "deemed" appears many times in the Internal Revenue Code. This is especially true where, as here, the government contends that this fictional claim is a claim that is not, and cannot be a return, notwithstanding that it is not contested that if Lundy had filed a return/claim on the notice date he would have received the refund. The subject clause is correctly interpreted as referring to a claim that the taxpayer *could have filed*. The Tax Court has so described it. *Galuska v. Commissioner*, 98 T.C. 661, 665, affirmed without discussion of this point 5 F.3d 195 (7th Cir. 1993).

Your amicus would also point out that the statement by the Seventh Circuit in *Galuska*, 5 F.3d at 196, quoted by Petitioner herein (Br. at 23), that Galuska "agrees that under Section 6512(b)(3)(B) he is deemed to have filed a claim for refund of the alleged overpayment * * * when the Commissioner mailed him the notice of deficiency," does not comport with the facts. A full 12 pages of the brief and reply brief for Galuska were devoted to disputing this very point.

satisfied all of the requirements for a refund of his overpaid taxes.

To avoid the obvious command of this Ruling, the government contends that any claim Lundy might have filed cannot, *under any construction*, have constituted a return. That is, it would have been what can only be described as a "naked claim." Thus, no return would have been filed on the date the naked claim would have been filed, the consequence of which is, according to the government, that such a claim cannot have been filed within the required 3-year period *after* the return was filed. The government contends this analysis invokes the 2-years after payment clause of section 6511(a).

The government takes this position, notwithstanding that its own regulations do not permit a "naked claim." Rather, the applicable regulations *require* that a claim in the present circumstances *must be filed on a tax return*. Moreover, judicial interpretation has established that the information and other formal requirements for a valid claim are coextensive with the requirements for a return. Thus, any claim that could have been filed, in order to constitute a valid claim, would, as a matter of law, also be a return. There is no authority to support the "naked claim" concept the government posits as the only claim that could have been filed on the notice date.

Although only a naked claim will support the government's position, there is no discussion in Petitioner's Brief addressing the possibility that such a document even could exist. Even if a naked claim is a theoretical possibility, the government's argument falls far short of demonstrating that Congress intended this peculiar creature, so dramatically different than what is commonly understood to be a "claim." Given that this fictional document *would not be valid* under the government's own regulations, even if it were actually filed, the failure to address this question is a glaring omission. Surely the government should at least be required to proffer some authority (or other explanation) in support of such a critical part of its argument.

1. A taxpayer who has not filed a return does not run afoul of the two year rule contained in the first clause of section 6511(a), because if a claim had been filed on that date, it would have to constitute a "return," as a matter of law, and would satisfy the 3-year rule of section 6511(a).

It is fundamental to the position of the government in this case that the claim referenced in section 6512(b)(3)(B) is not, and cannot be, a return:

> * * * on the date the notice of deficiency was issued and the statutorily imputed refund claim arose under Section 6512(b)(3)(B), "no return was filed by the taxpayer" (26 U.S.C. 6511(a)).

(Br. at 17). See also *Galuska*, 5 F.3d at 197 ("* * * the Internal Revenue Code does not empower the Tax Court to treat a taxpayer * * * who has not filed a return as of the date the deficiency notice was mailed as if he had filed a return by that date"). Although the government contends that the "deemed claim" construct is "wholly semantical" (Br. at 23), and suggests that the Fourth Circuit's criticism of that terminology might be irrelevant, *id*, to the contrary, this question is critical to the present issue. The government's interpretation can prevail *if, and only if*, a valid claim for refund does not also constitute a tax return (where a return has not previously been filed), as a matter of law.

Copious authority establishes that (1) no particular form is required for either a "return" or a "claim," and (2) the essential elements for a document to constitute a "return" are coextensive with the elements of a "claim." Curiously, none of the courts that has interpreted the question presently before this Court has considered this question, notwithstanding that it is critical to the application of section 6512(b)(3)(B), and some of those courts have relied on the conclusion that "no return" had been filed on

the date the notice of deficiency was issued. [2] The Tax Court, for instance, has never considered what constitutes a "claim" within the meaning of either section 6512(b)(3)(B) or 6511(a) or (b), even though that court distinguishes between a "return" and a "claim" in this context, [3] and that distinction is *crucial* to its rulings in these overpayment cases. [4]

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[2] The Seventh Circuit did not cite any authority for this point, merely concluding that a taxpayer could not be treated as if he had filed a return. *Galuska*, 5 F.3d at 197. This issue was argued on brief in the circuit courts in *Galuska, Davison (by amicus), Anderson, Richards and Rossman*, but none of those courts analyzed the question.

[3] In this very case the Tax Court stated:

> Petitioner also contends that the deemed claim should include a "deemed return". Again, we must disagree. Although one document could serve both functions--be a tax return and also be a claim for credit or refund--it does not follow that "tax return" and "claim for credit or refund" are interchangeable terms. In section 6511(a), the Congress uses the term "return" three times and the term "Claim for credit or refund" twice in close juxtaposition. From this, we conclude that the Congress understood there was a difference between a tax return and a claim for credit or refund. In section 6512(b)(3)(B), the application of which depends in part on section 6511(a), the Congress refers to a claim for credit or refund and does not refer to a tax return. From this, we conclude that, although section 6512(b)(3)(B) embodies a deemed-claim concept, it does not embody a deemed-return concept.

Lundy v. Commissioner, T.C.M. 1993-278.

[4] There is no question that, for purposes of section 6511, a return claiming on overpayment constitutes both a return and a claim, and that such a return/claim is necessarily filed within the 3-year period prescribed in section 6511(a). If Lundy had filed a return/claim on the notice date, he clearly would have been entitled to refund of his overpayment. The only conclusion possible from the decided cases on this issue is that the

(continued...)

The difficulty with this distinction is that is does not withstand definitional scrutiny. First, where a return has not been filed, the IRS's own regulations mandate that a claim is to be filed on a tax return:

> In general, in the case of an overpayment of income taxes, a claim for credit or refund *shall be made* on the appropriate income tax return.

26 C.F.R. section 301.6402-3(a)(1) (Emphasis added). [5] See also *Taylor v. United States*, 83-2 U.S.T.C. ¶9456 (Cl. Ct. 1983) ("A taxpayer usually makes a refund claim by means of a tax return."). To be valid under this regulation, where a return has not previously been filed, a claim *must* be made on a return. This regulation, issued under the specific authority of section 7422(a), is a so-called "legislative regulation," [6] having "the same effect as a valid statute." *CWT Farms, Inc. v. Commissioner*, 755 F.2d 790, 800 (11th Cir. 1985) *cert. denied* 477 U.S. 903 (1986). See also *Water Quality Ass'n Employees Benefit Corp. v. United States*, 795 F.2d 1303, 1305 (7th Cir. 1986); *Anderson, Clayton & Co. v. United States*, 562 F.2d 972, 976 (5th Cir. 1977) *cert. denied* 436 U.S. 944 (1978). [7] Construing "claim" in section 6512(b)(3)(B) to exclude even the possibility that a claim may be made on an original return completely ignores the requirements of this regulation, an impermissible construction. See *Beckwith Realty, Inc. v. United States*, 896 F.2d 860, 90-1 U.S.T.C. ¶50,150 (4th Cir. 1990) (refund suit dismissed where the taxpayer failed to satisfy the requirements of an effective claim for refund, as defined in these regulation sections, even though the claim had been filed on the specified form).

In addition, it must be accepted as self-evident that "claim," as used in section 6512(b)(3)(B), contemplates a claim that would be legally sufficient if it were actually filed. The construction placed

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[4] (. . . c o n t i n u e d) claim referred to in section 6512(b)(3)(B) *cannot also constitute a return*. Thus, whether a "claim" is or may also be a return (or a return/claim) is determinative. At a minimum, it must be accepted that a claim *can* be made on a return. Thus, the government's position can be sustained *only* if the claim referred to in section 6512(b)(3)(B) is found to *exclude* a return/claim. There is nothing to indicate Congress intended such a restrictive definition.

[5] Where a tax return has been filed, 26 C.F.R. section 301.6402-3(a)(2) directs that a refund claim is to be made on an amended return.

[6] See *Brown-Forman Corp. v. Commissioner*, 955 F.2d 1037, 92-1 U.S.T.C. ¶50,075 (6th Cir. 1992) *cert. denied* 113 S.Ct. 87 (1992).

[7] Section 7422(a) specifically authorizes the Secretary to prescribe regulations for filing claims for refund. Regulations issued under specific statutory authorization are legislative regulations. Such legislative regulations, if consistent with statutory authorization, adopted pursuant to proper procedure, and reasonable, have the force of law. *Tamura v. United States*, 734 F.2d 470, 472, 84-2 U.S.T.C. ¶9545 (9th Cir. 1984); *Dillon Ranch Supply v. United States*, 652 F.2d 873, 880, 81-2 U.S.T.C. ¶16,371 (9th Cir. 1981).

Even if this regulation were considered an "interpretive regulation," it would be entitled to "great weight." See *Water Quality Ass'n Employees Benefit Corp.*, 795 F.2d at 1305; *Caterpillar Tractor Co. v. United States*, 589 F.2d 1040, 1043 (Cls. Ct. 1978). Interpretive regulations are those not specifically authorized by an originating statute, but finding their authority in section 7805(a), which permits the IRS to promulgate "all needful rules and regulations for the enforcement of this title * * *." See *Gehl Co. v. Commissioner*, 795 F.2d 1324, 1328 (7th Cir. 1986). The Tax Court has held that "[a]n interpretive regulation must be sustained unless unreasonable and plainly inconsistent with the revenue statute." *Shereff v. Commissioner*, 77 T.C. 1140, 1143 (1981). It is plain that this regulation is reasonable. The government seeks to avoid the rule of this regulation, but it has not articulated any reason it should be permitted to do so.

on this word by the courts, however, demands that the claim [8] (which even though not actually filed is to be analyzed as if it were filed) mentioned in section 6512(b)(3)(B) *cannot* comply with the requirements of the applicable regulations; that is, it cannot be legally sufficient. It makes no sense to accord legal significance to, and to treat as filed, a hypothetical claim which would be a nullity if it were actually filed. Congress intended the Tax Court's jurisdiction to depend upon a hypothetical *valid* "claim," not a hypothetical "nothing."

Second, both a tax return and a claim for refund must contain certain minimum information. Although returns are provided for in section 6011, which also contains specific authorization for the Secretary of the Treasury to prescribe the forms which are to be used for this purpose, the term "return" is not defined in the Internal Revenue Code. The regulations implementing this legislative mandate, and specifying the official forms to use, are found at 26 C.F.R. section 1.6011-1. Although the proper form (*i.e.*, Form 1040) may be preferred, it is neither mandatory nor the exclusive document to constitute a "return." Notwithstanding the regulations, this Court has held that a document not in conformance with the specified forms can still constitute a return. See *Florsheim Brothers Drygoods Co. v. United States*, 280 U.S. 453 (1930); *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172, 35-1 U.S.T.C. ¶9003 (1934). See also *United States v. Klee*, 494 F.2d 394, 74-1 U.S.T.C. ¶9412 (9th Cir. 1974); Rev. Rul. 74-203, 1974-1 C.B. 330.

A. *Return defined*. In *Beard v. Commissioner*, 82 T.C. 766, 777-780 (1984), the Tax Court synthesized these, and other cases cited therein, and found the following requirements to define what constitutes a "return:" (1) there must be sufficient data to calculate tax liability; (2) the document must purport to be a return; (3) there must be an honest and reasonable attempt to satisfy the

[8] Whether it be called "imputed," "deemed" or "hypothetical."

requirements of the tax law; and (4) the taxpayer must execute the return under penalties of perjury. 82 T.C. at 777.

B. *Claim for Refund defined*. Claim for refund, likewise, is not defined in the Internal Revenue Code. Claims for refund are provided for in section 7422. Congress directed the Secretary to make appropriate regulations governing claims for refund. See section 7422(a) (suit for refund cannot be maintained "until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, *and the regulations of the Secretary established in pursuance thereof.*") (Emphasis added). In duly promulgated regulations the IRS has ruled how a claim is made, and has provided that a claim for refund *must* be made on a return, where a return has not previously been filed. 26 C.F.R. section 301.6402-3(a)(1) (a claim for credit or refund of income taxes "*shall be made* on the appropriate income tax return.") (Emphasis added). [9] See also 26 C.F.R. section 301.6402-2; *United States v. Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 272, 2 U.S.T.C. ¶708 (1931). Thus, the IRS has provided the missing definition, and it has specified that *a claim must be a return*, where a return has not yet been filed.

C. *Comparison of requirements of returns and claims*. Comparing the *Beard* requirements establishes the functional identity of claims and (previously unfiled) returns:

(1) A claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof, and must identify the amount of refund sought, and the nature of the claim. That is, it must contain sufficient information to determine the correct tax liability. Applicable Treasury Regulations require that:

> [t]he claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. The statement of the

[9] See footnote 7, *supra*.

> grounds and the facts must be verified by a written declaration that it is made under the penalties of perjury. A claim which does not comply with this paragraph will not be con sidered for any purpose as a claim for refund or credit.

26 C.F.R. section 301.6402-2(b)(1). "The statute is not satisfied by the filing of a paper which gives no notice of the amount or nature of the claim for which the suit is brought, and refers to no facts upon which it may be founded." *United States v. Felt & Tarrant*, 283 U.S. at 272. See also *Berenfeld v. United States*, 442 F.2d 371, 375, 71-1 U.S.T.C. ¶9401 (Ct.Cl. 1971) (Refund claim must set forth "some specified reason indicating erroneous or illegal collection"); *Beckwith Realty, Inc. v. United States*, 896. F.2d 860, 90-1 U.S.T.C. ¶50,150 (4th Cir. 1990) (refund suit dismissed because the taxpayer failed to state with sufficient particularity the grounds for its claim).

In the context of a claim for refund where a return has not previously been filed, an obvious baseline requirement is to set forth the taxpayer's position of the correct amount of tax. That is, such a claim must, at a minimum, calculate a tax liability (and then compare it with the amount paid).

This specificity requirement is also incorporated in section 6512(b)(3)(B) by the requirement that the claim referred to in that section be considered as "stating the grounds upon which the Tax Court finds that there is an overpayment." The ground upon which Lundy claimed his overpayment is that his correct tax liability is less than the amount paid. The Tax Court found, indeed, the parties stipulated, that Lundy did, in fact, overpay his 1987 taxes. There is simply no difference between the information relied on by the Tax Court to make its finding, and the information that would have to have been required to be included in any claim filed on the notice date. That required information is precisely the same as would be required in a tax return.

(2) The second *Beard* requirement is that the document must purport to be a return. In *Beard*, the Tax Court discussed this requirement as follows:

> The [Supreme] Court [in *Florsheim Brothers*, 280 U.S. 453] recognized that the filing of a return that is defective or incomplete may under some circumstances be sufficient to start the running of the period of limitation. However, such a return *must purport to be a specific statement of the items of income, deductions, and credits* in compliance with the statutory duty to report information and to have that effect it must honestly and reasonably be intended as such.

Beard, 82 T.C. at 778 (Emphasis added, emphasis in original omitted). It is self-evident that any document purporting to be a refund claim, in the absence of a previously filed tax return, would have to contain an accurate tax computation, and would have to include a specific statement of the items of income, deductions and credits upon which such a computation would be based. This requirement, again, matches the second *Beard* requirement. Further, the normal way for a taxpayer to make a refund claim is to file a return. *Taylor v. United States*, 83-2 U.S.T.C. ¶9456.

(3) The third *Beard* requirement is that there must be an honest and reasonable attempt to satisfy the tax laws. Section 6512(b)-(3)(B) refers to a claim that sets forth the grounds upon which the Tax Court ultimately finds the overpayment. A claim that sets forth, or is considered to set forth, those grounds obviously is intended to constitute an honest and reasonable attempt to comply with the tax laws. Congress cannot have had any other intention in this provision. Moreover, by filing a petition in the Tax Court, a taxpayer submits to the jurisdiction of the court. No conclusion can be drawn other than that the taxpayer is considered to be

making an honest and reasonable attempt to comply with the tax laws.

(4) Finally, the fourth *Beard* requirement is that the document must be executed under penalties of perjury. This is also required for claims. 26 C.F.R. section 301.6402-2(b)(1).

Although the courts and the government attempt to distinguish between a tax return and a claim in the present context, no authority has been cited to support the distinction. Your amicus has not found any case in which a valid claim for refund that was filed when no tax return had yet been filed was held not to constitute a return. The only authorities that consider related matters either require such a claim to be made on a return, Treas. Regs. 26 C.F.R. section 301.6402-3(a)(1), assume the claim is filed on a late return, *e.g.*, Rev. Rul. 76-511, or a late return claiming the refund was actually filed. See *Curry v. United States*, 774 F.2d 852, 85-2 U.S.T.C. ¶9743 (7th Cir. 1985); *Mills v. United States*, 93-1 U.S.T.C. ¶50,019 (E.D. Tx 1992); *Risman v. Commissioner*, 100 T.C. 191, at 199, 203-04 (1993). [10]

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[10] Because the requirements for both documents are essentially coextensive, in an appropriate case there is certainly room for a taxpayer who files an incorrect document to argue that the document should nevertheless be considered a "return" as well as a "claim." Compare 26 C.F.R. section 301.6402-2 and *United States v. Felt & Tarrant Mfg. Co. v. United States*, 283 U.S. 269, 272, 2 U.S.T.C. ¶708 (1931); *Beckwith Realty, Inc. v. United States*, 896 F.2d 860, 90-1 U.S.T.C. ¶50,150 (4th Cir. 1990), setting forth minimum requirements for refund claims, with *Florsheim Brothers Drygoods Co. v. United States*, 280 U.S. 453 (1930); *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172, 35-1 USTC ¶9003 (1934); *United States v. Klee*, 494 F.2d 394, 74-1 USTC ¶9412 (9th Cir. 1974); *Beard v. Commissioner*, 82 T.C. 766, 777-780 (1984), providing that no specific form is required to constitute a return and describing what does constitute a return.

There is not room, however, for the government to ignore its own regulations and contend that the "claim" to which section 6512(b)(3)(B) refers is anything other than the claim required by its own regulations. That is a preposterous contention. "Just as men must turn square corners

(continued...)

At the very least, it must be accepted that a legally sufficient claim *can* qualify as a return, for purposes of section 6511, even if it is not filed on the prescribed form. The only question remaining, then, is whether the "claim" referenced in section 6512(b)(3)(B), which is also a "claim" for purposes of section 6511(a), *excludes even as a possibility* that it might also constitute a return. Congress used this single word in both sections, and incorporated section 6511 by reference into section 6512(b)(3)(B). Under these circumstances, the only reasonable inference is that Congress intended the word "claim" to have the same meaning in both sections. They are *in pari materia*.

Certainly, there is nothing to suggest that the term "claim for credit or refund" in Section 6512(b)(3)(B) is anything other than co-extensive with that same term in Section 6511(a), including any regulatory or judicial interpretation.[11] Whatever the meaning

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[10] (. . . continued) when they deal with the government, *Rock Island, Arkansas & La. R.R. v. United States*, 254 U.S. 141, 143, 1 U.S.T.C. ¶38 (1920), so must government officials 'walk around the same block' when acting on the government's behalf." *Roberts v. United States*, 13 Cl. Ct. 774, 777 (1987), rev'd on other grounds, no. 88-1165 (Fed. Cir. Apr. 12, 1988) (unpub.). "The Government should turn square corners, not taxpayers alone." *deRochemont v. United States*, 91-1 U.S.T.C. ¶50,238 (Cls. Ct. 1991). The government, as well as taxpayers, are bound by these regulations.

[11] Congress used the same term (i.e., "claim") in two related sections. No definition was provided in either section. In all probability, Congress did not formulate any intention other than whatever "claim" means in section 6511, it has a like meaning in section 6512(b)(3)(B), and to the extent the meaning of that word is not clear, it was to be defined by the IRS and, ultimately, the courts. The definition which has developed is that "claim" includes a claim made on an original return. If Congress intended to deprive the Tax Court of jurisdiction in these circumstances, knowing that taxpayers who elect to litigate their liability in the Tax Court will suffer the severe consequence of forfeiting refunds they otherwise

(continued...)

and scope of the term "claim for credit or refund" in section 6511(a), it has the same meaning in section 6512(b)(3)(B). All section 6512(b)(3)(B) requires is an examination of how a "claim" would be treated if it had been filed on the notice date. Because "claim" includes a claim made on an original return, the government's attempts to dismiss this even as a possibility misses the mark.

Section 6512(b)(3)(B) focuses the inquiry on how a claim would have been treated if the claim were filed when the notice of deficiency was issued. It is only by ignoring longstanding administrative and judicial interpretation to the contrary that the government arrives at the conclusion that this one type of "claim" is outside the scope of Section 6512(b)(3)(B), notwithstanding that it is a valid "claim" for virtually all other purposes. The only construction under which the government's position can be sustained would be that the word "claim" in section 6512(b)(3)(B) *specifically excludes* a claim made on an original return. There is no evidence Congress intended such a result, and if Congress did intend that result it would have said so explicitly.

As discussed above, the statute authorizes refund of the amount that would be refundable "if *a claim* had been filed." The plain meaning of the word "claim," including its use in section 6512(b)(3)(B), *includes* a claim made on an original return, and, if such a claim had been filed Lundy would be entitled to a 3-year lookback. This construction is consistent with the words used in

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[11](...continued)
could obtain simply by eschewing the Tax Court as their forum, it would have said so clearly. Certainly, the Congress would have recognized the potential for confusion that would result from using the same word in the two relevant sections, intending a specific definition in only one of the sections. Speculation that Congress intended such confusion, especially when the severe consequence of forfeiture is the result, is cynical in the extreme. Further, the government's argument seriously undercuts its reliance on the "plain meaning" of the language used. The government's construction requires a meaning far removed from the plain meaning.

the statute, and has the virtue of equating the definition of the same word in the two sections.

Moreover, "* * * the language of a tax statute should not be turned in to a trap for the unwary." *Chu v. Commissioner*, 486 F.2d 696, 706, 73-2 U.S.T.C. ¶73-9750 (2nd Cir. 1973)(Judge Campbell, concurring in the result). This is especially true where the Commissioner's notice of deficiency, sometimes called the "ticket to the Tax Court," [12] fails to make any mention, whatsoever, of refunds of overpaid taxes. Given that taxpayers in the circumstances of this case are treated differently, under the government's and the Tax Court's view, depending on the forum in which they litigate their tax dispute, the trap is sprung when the unwary taxpayer, following the only suggestion for litigation contained in the notice of deficiency, files in the Tax Court.[13] That result flows only from a restrictive interpretation of the applicable statutory provision, which interpretation depends on a definition of the word "claim" as it is used in Section 6512 that is different than its use in Section 6511, and everywhere else in the Internal Revenue Code.

For the purpose of determining the amount that would be refundable under section 6511 if the taxpayer had filed a claim on the notice date, as directed by section 6512(b)(3)(B), once it is accepted that any such claim must be considered to be a valid and legally sufficient claim, such claim must, as a matter of law, be

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[12] *Estate of Yaeger v. Commissioner*, 889 F.2d 29, 34 (2nd Cir. 1989).

[13] The notice of deficiency advises a taxpayer that s/he may contest the IRS determination before making any payment by filing a petition with the Tax Court, that if petition is not filed within the applicable 90 day period the Tax Court cannot hear the case, and that if a petition is not filed within that time the law requires that the IRS assess and bill the taxpayer for the taxes said to be due. No mention is made of the possibility of litigating in any other court, and *no mention, whatsoever, is made concerning overpaid taxes*.

considered to contain sufficient information also to constitute a return. Because such a claim would be filed within three years from the time the return was filed (*i.e.*, simultaneously, see Rev. Rul. 76-511; *Risman,* 100 T.C. at *), the refundable amount would be determined under section 6511(b)(2)(A), and Lundy would be entitled to a refund.

2. Section 6511(a) provides three distinct rules, each of which applies to a specified class of taxes. The rule in section 6511(a) that provides "if no return was filed by the taxpayer, [a claim must be filed] within 2 years from the time the tax was paid" *does not apply to taxes for which a return is required*, hence it does not apply to the taxes in this case.

A. *The first clause of section 6511(a) provides the exclusive limitations period for all taxes for which a return is required to be filed.*

Section 6511(a) contains limitations rules for three distinct types of taxes. The first rule, which is the rule applicable in this case, provides:

> Claim for credit or refund of an overpayment of *any tax imposed by this title in respect of which tax the taxpayer is required to file a return* shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later * * *

Section 6511(a) (Emphasis added). This is the rule for *all taxes* for which a tax return is required; filing a return is neither necessary nor relevant to its operation. A return is generally required for income taxes, [14] so this clause specifies the period

[14] A return is required if gross income exceeds the sum of the

(continued...)

within which claims for refund of income taxes must be filed. This clause contains both a 3-year rule and a 2-year rule, and will be analyzed in depth, *infra*.

B. *Section 6511(a) contains a second "2-year rule," but that rule does not apply to taxes for which a return is required to be filed.*

Some confusion has arisen in the cases considering the present issue because section 6511(a) contains a *second* 2-year rule: [15]

> [Claim for credit or refund of an overpayment * * * shall be filed by the taxpayer * * *] if no return was filed by the taxpayer, within 2 years from the time the tax was paid.

Section 6511(a). Although this rule does not state explicitly to which taxes it applies, close analysis reveals that it *does not apply* to the taxes at issue in this case.

Section 6511 prescribes exclusive limitations periods for filing tax refund claims, rather than the general six-year limitations period for civil claims against the government. See *J.O. Johnson, Inc. v. United States*, 476 F.2d 1337, 1340-41 (Ct. Cl.), *cert. denied*, 414 U.S. 857 (1973); Treas. Regs. 26 C.F.R. section 301.6511(a)-1. Section 6511 applies to all taxes under the

[14](...continued)
personal exemptions to which the taxpayer is entitled and the standard deduction. Section 6012(a). For 1987, the standard deduction for married persons filing jointly was $3,760, section 63(c)(2)(C)(as in effect for 1987), and each personal exemption was $1,900. Section 161(d)(as in effect for 1987). A return for married persons filing jointly was required for 1987 if gross income exceeded the sum of $3,760 and $3,800, or $ 7,560. The Lundys' reported adjusted gross income for 1987 was $76,485, far in excess of the filing threshold.

[15] The third rule of section 6511(a) applies to taxes payable by stamp, and has no application to this case.

Internal Revenue Code, not only taxes for which returns are required.

However, not all taxes are required to be reported on a return, and Congress perceived that a separate rule was necessary to provide a limitations period for refund claims of "no return required" taxes. One example of a tax for which no return is required is the penalty pursuant to section 6672 (the so-called "Trust Fund Recovery Penalty," formerly called the "100% penalty"). See *Kuznitsky v. United States*, 17 F.3d 1029, 93-2 U.S.T.C. ¶50,491 (7th Cir. 1994); *US Life Title Insurance Co. v. United States*, 784 F.2d 1238, 1243 n.6, 86-1 U.S.T.C. ¶9278 (5th Cir. 1986) ("Since no returns are filed in the case of section 6672 liabilities, only the two-year rule has significance here."). Other examples are transferee liability under section 6901, see *Ancel v. United States*, 398 F.2d 456, 457, 68-2 U.S.T.C. ¶9470 (7th Cir. 1968), and the tax on prohibited transactions under section 4975. [16] Further, even some *income* taxpayers are not required to file a tax return. See footnote 14, *supra*. Even though a taxpayer may not have sufficient income to trigger a filing requirement, tax may be withheld during the year, or other tax payments might be made. Arguably, the three year rule, by its own terms, does not apply to this taxpayer, because no return is required to be filed. See also 26 C.F.R. section 301.6402-3(c), which provides that if no return is required, filing a return "shall be treated as a claim."

The history of section 6511(a) further supports the non-applicability of the "no return filed" clause to taxes with respect to which a return is required. As originally enacted, [17] the relevant portion of section 6511(a) read as follows:

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[16] This second 2-year clause might also apply in the case of a taxpayer whose property was wrongfully seized for payment of the taxes of another person. See *United States v. Williams*, __ U.S. __ (1995).

[17] Internal Revenue Code of 1954, ch. 736, 68A Stat. 808.

> (a) PERIOD OF LIMITATION ON FILING CLAIM. - Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer *within 3 years from the time the return was required to be filed* (determined without regard to any extension of time) or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. * * *

Internal Revenue Code of 1954, section 6511(a) (Emphasis added). In this original version of section 6511(a), in the case of taxes for which a return was required, taxpayers were *always* permitted a full three years from the date their returns were due within which to make a refund claim. Whether a return was actually filed was irrelevant, because the measuring date for the three year rule was the *return due date*, not the filing date. Under this original provision, a taxpayer who filed a claim for refund (even if that claim was not also a return) between 2 - 3 years after the taxes were paid, i.e., more than two but less than three years after the due date in the case of withheld taxes, would be entitled to a refund. Thus, for "return required taxes," the original rule applied *in all cases*, and the amount refundable was determined under section 6511(b)(2), *viz.*:

- If the claim was filed within three years of the due date, it was timely, and per section 6511(b)(2)(A) the taxpayer could obtain a refund of all taxes paid in the preceding three years.
- If the claim was filed more than three years after the due date, section 6511(b)(2)(B) limited the refund to amounts paid in the preceding two years.

Because this rule covered all possible circumstances, no additional rule was needed for return required taxes. Thus, the second 2-year rule was not meant to apply to taxes for which a

return was required. Where a tax was not reportable on a return, or a return was not otherwise required, obviously it would not be filed, and Congress provided, *in a separate rule*, that the claim must be filed within two years after payment. In those cases, section 6511(b)(2)(B) operated to limit the refund to amounts paid within the two year period before the claim was filed. [18]

Any other construction leads to an inevitable and irreconcilable conflict between these two clauses. If a return was required but not filed, the first clause would have permitted a claim for a full three years, whereas the second clause would bar it after two years. [19] This statutory clash is avoided by recognizing that the "no return required" rule simply does not apply if a return is required. There is no ambiguity here to resolve.

Further, if the second 2-year clause applied to taxes for which a return was required, it was redundant, because, as discussed above, there was no situation to which it could have applied that was not already provided for by the previous clause. To give effect to all of the words used by the Congress, this provision must be recognized to have been limited in its application only to

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[18] Tax refund claim cases always present two questions. The first question is whether a timely claim has been filed. This is governed by section 6511(a). If the claim is not timely under those rules, no refund is allowed. Section 6511(b)(1). If, and only if, a claim has been timely filed, the second question is how much may be refunded. This is where the section 6511(b)(2) limits come into play. An example will illustrate: Assume a return is required, taxes are overpaid by withholding, and the taxpayer makes an additional payment 2 years after the return due date. If the claim is not filed until 3 1/2 years after it was due, it is timely under section 6511(a), because it is filed simultaneously with the return. However, the amount refundable is limited because the two year look-back period will only reach the second payment (1 1/2 years before the claim was filed). See *Mills v. United States*, 805. F. Supp. 448, 450, 93-1 U.S.T.C. ¶50,019 (E.D. Tex. 1992) (discussing the "two limitations hurdles" imposed by section 6511.

[19] This again demonstrates why *Miller*, 38 F.3d 473, *infra*, is incorrect.

those taxes for which a return *was not required*, even though that is not explicitly stated. See *Mountain States Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (all of the words used by Congress are to be given effect). This is the only interpretation of this clause, as it appeared in the original version of section 6511(a), that does not render the words "in respect of which the taxpayer is required to file a return" superfluous.

Section 6511(a) was amended to its present form in 1958 [20] in order to conform the limitations period for refund claims with that for tax assessments. *Allen v. Commissioner*, 99 T.C. 475, 480-81 (1992). The amendment did not change the second 2-year rule, and was not addressed to -- and did not alter in any manner -- the applicability of the "return required" clause. *A fortiori* it did not make the "no return required" clause applicable to taxes to which it did not apply before the amendment, *i.e.*, taxes for which a return is required to be filed.

The government contends the purpose of this clause is unclear. (Br. at 30, note 12). The purpose becomes clear, however, on recognition that this (second) clause refers *only* to taxes for which the taxpayer was not required to file a return; that is, it *does not apply* to taxes for which a return is required. [21]

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[20] Section 6511(a) was amended to its present form in the Technical Amendments Act of 1958, Pub. L. 85-866, sec. 82(a), 72 Stat. 1663. S. Rept. 1983, 85th Cong., 2d Sess. (1958), 1958-3 C.B. 1019-1020, 775, 85th Cong., 1st Sess. (1957), 1958-3 C.B. 854-855, 912.

[21] It should also be noted that this interpretation does not mean that a taxpayer who litigates in the tax court always gets the benefit of the 3-year rule. For example, a deficiency notice issued more than three years after a return is filed can still be timely for a variety of reasons. See e.g., sections 6501(c)(1), (2), (7) & (8); 6501(e); 1034(g). If the deficiency notice is issued more than three years after a return was filed, a claim filed on that date *would not* have been filed within the required three year period, and the taxpayer would get the benefit of only a 2-year look-back,

(continued...)

In this light, it is also clear that *Miller v. United States*, 5 F.3d 473 (9th Cir. 1994), was incorrectly decided. *Miller* involved taxes for which a return was required, so the second 2-year clause is not applicable. As demonstrated, *supra*, the first 2-year clause also does not apply, because Congress intended that taxpayers would always have *at least* a 3-year period within which to file returns; the 1958 amendments to section 6511 were not intended to shorten the time within which any refund claim was required; their sole function was to *extend* the time within which some refund claims could be filed.

It is surprising that the government even suggests before this Court that *Miller* may be correct. First, the Internal Revenue Service ruled many years ago that taxpayers *do not lose* the right to claim a refund when two years have passed from the due date of the return. Revenue Ruling 76-511. Second, and of particular significance here, is that the government not only did not advance that argument in *Miller*, but actually advised the circuit court, in its brief in opposition to Miller's petition for rehearing, that it *disagreed* with the court's rationale, and suggested that the court should modify its opinion. [22] Third, as argued strenuously by Respondent Lundy in his merits brief in this Court, the IRS has for many years counseled taxpayers throughout the land that overpaid taxes could be claimed by filing a return any time up to three years after the return due date. It is way to late for the government to adopt this new interpretation.

The enormity of this problem is illustrated by a recent editorial published in the New York Times on July 29, 1995, by former IRS Commissioner Shirley D. Peterson, in which she noted that

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[21] (. . . c o n t i n u e d) under section 6511(b)(2)(B).

[22] The government argued that the outcome in *Miller* was correct, however, because Miller had not filed a return even within the 3-year period.

in 1990 10 million people did not file tax returns, and that almost 3.5 million of them were entitled to refunds. This is not an isolated matter that only affects a limited number of taxpayers. As this demonstrates, literally millions of Americans are being lulled each year by the IRS into believing they may claim refunds by filing late returns up to three years after they were due. The government is being disingenuous, and less than forthright with this Court in maintaining any position in support of *Miller*.

CONCLUSION

The refundable amount of an overpayment determined by the Tax Court is the same amount that would have been refundable had the taxpayer filed a claim for refund on the date the notice of deficiency was mailed. If a taxpayer were to file a claim at any time within three years of the return due date, that taxpayer would be entitled to a refund of all taxes overpaid in the prior three years. If a return has not already been filed, a claim must be made by filing a return. Even if the prescribed forms are not used, provided there is sufficient information for the claim submitted to constitute a valid claim, as a matter of law, it must also constitute a return. [23] No authority has been cited to support the government's argument that the "claim" referred to in section 6512(b)(3)(B) somehow is a wholly different creature than all other refund claims provided for in the Internal Revenue Code, yet that proposition is central to the government's argument.

If Lundy had filed a claim for refund on the date the notice of deficiency was mailed: (1) that claim would have had to constitute a return, as a matter of law, (2) that claim would have been filed

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[23] The corollary to this is that if there is not sufficient information, the submission would not constitute a valid claim. It is intuitively obvious that when Congress referred to a "claim" in section 6512(b)(3)(B), it referred to a *valid* claim. No other construction would make any sense at all.

within three years after the return was filed (*i.e.*, simultaneously) and (3) he would have been entitled to refund of his overpaid taxes for 1987.

The decision of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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